IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH G. STOREY, JR. *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	}	No. 20932

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANT'S OPENING BRIEF

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JURISDICTION

This is an appeal from a judgment of conviction entered by the United States District Court for the Western District of Washington, Northern Division. (R7) ("R" shall refer to the Transcript of Record, and the number following to the page therein.) The District Court had jurisdiction under Title 18, Sec. 3231, United States Code. The indictment alleged an offense against the Universal Military Training and Service Act (50 U.S.C. App. Sec. 462). (R1) This Court has jurisdiction of this appeal under Rule 27(a)(1) and (2) of the Federal Rules of Criminal Procedure, since the notice of appeal was filed in the time and manner required by law. (R8)

STATEMENT OF THE CASE

Explanation of Exhibits:

Appellant's Selective Service file was submitted into evidence as Government's Exhibit 1, 2 and 3. Exhibit No. 1 being the main portion of his Selective Service file. Exhibit No. 2 being letters filed with the local board after the Selective Service file had been forwarded to the State Director for photostating. Exhibit No. 3 is the appellant's order of induction. ("Ex." shall refer to Government's Exhibit No. 1, the appellant's Selective Service file, and the number following, to the paginated document therein. Pagination is in pencil in the lower right hand corner of each document.)

The original of the Hearing Officer's recommendation to the Department of Justice was entered into evidence, by stipulation, as Defendant's Exhibit A-1. (App. B.)

The reporter's Transcripts of Evidence were dated and covered the following: arraignment dated August 2, 1965; the hearing dated December 6, 1965; argument dated January 21, 1966, and the sentencing dated February 25, 1966. ("T", unless otherwise indicated, shall refer to the reporter's Transcript of Evidence for December 6, 1965, covering the hearing.)

Concise Summary:

Appellant is a conscientious objector, opposed to both combatant and noncombatant duty in the armed forces. He is, however, willing to work in the civilian work program as an alternative mode of service. (Ex. 156; T. 113) He was classified I-A-O (available for noncombatant duty) by the Appeal Board, subsequently ordered to report for induction but refused. He was indicted for an alleged violation of the Universal Military Training and Service Act. (R1; 50 U.S.C. App. Sec. 462)

Appellant pleaded "Not Guilty," waived trial by jury (T 8/2/65 p 5; R2) and was tried on December 6, 1965.

Motion for Judgment of Acquittal was made at the close of the Government's case (R5) which was argued and denied. (T. 26) The Motion was renewed, with additional points added, at the close of all the evidence (R3), was argued and denied. (T 1/21/66, pp 4-6) Appellant was convicted on January 21, 1966 (T 1/21/66, p 6) and sentenced on February 25, 1966 (R14) to the custody of the Attorney General for a period of four years. (R7)

Statement of Facts:

On July 27, 1958, the appellant started working at Boeing as a draftsman. He worked on drawings of maintenance and electronic testing equipment. The equipment was used to test component parts of a missile. His job had nothing to do, directly, with the missile itself. (Ex. 86, 153; T. 30)

On March 25, 1963, appellant informed his local board that he embraced the principles of conscientious objection, opposed to both combatant and noncombatant duty, and requested the Special Form for Conscientious Objectors. (Ex. 155, 156)

Other members of the appellant's church were also employed at Boeing. (T. 35, 36, 54) Appellant was informed by two of these members, Gerald Lindberg and Donald Roulette, that they had inquired and that their employment was condoned in the eyes of the church. (T. 30, 31, 46-48, 51, 52)

The Appellant's local church in Seattle was in fact under a misimpression as to the teaching of the Headquarters church regarding defense work. The local church viewed such work as permissible and so advised members who asked about the subject. (Ex. 67, 69, 90; T. 53, 54) Appellant, therefore, was under the sincere conviction that his job was permissible in the eyes of God and his church. There was

no conflict or compromise with his conscience. (T. Redirect 44, 45; Ex. 61, 55)

On April 3, 1963, the appellant wrote his local board and specifically requested information and advice from them regarding his work at Boeing. He informed them as to the type of work he was doing and then asked:

> "If you believe this to be defense work, then I will transfer to the Dyna Sour Program (which is for peaceful use) or quit immediately and take my chances of finding another job.
>
> "Please let me know if my job is considered defense work and what I should do." (Ex. 153)

The local board chose to totally ignore this request for advice and information. Neither did they refer the appellant to an advisor or an appeal agent. (T. 31, 32)

The State Director had appointed three or four advisors (32 CFR 1604.41) and one government appeal agent. (32 CFR 1604.71; T. 27) The names of the advisors were only posted on the bulletin board in the local board. (T. 28) Neither the local board nor the Hearing Officer ever referred the appellant to an advisor or appeal agent. (T. 32; 34) The appellant was only in the local board one time, and in fact never saw the list nor had knowledge from any other source that they even existed. (T. 32)

The appellant filed his Special Form For Conscientious Objectors on April 4, 1963, claiming exemption from both combatant and noncombatant duties. He stated as his grounds his unwillingness to use injuring force, that he was an Ambassador for Christ, that he could not become a slave to man by entering the Service, that Christ taught not to fight or resist evil nor to take vengeance, but to render good for evil, that his duties to God were higher than his duties to man and that if he transgressed God's laws he would lose salvation and be destroyed in the Lake of Fire. (Ex. 131-139)

The local board reclassified the appellant I-A (Ex. 10) and he requested a personal appearance hearing (Ex. 142) which was held on May 20, 1963. (Ex. 10) The appellant was retained in class I-A and he appealed. (Ex. 10, 121)

In his letter of appeal, the appellant informed the local board that he had been baptized into the Church of God on May 26, 1963, subsequent to his hearing before them. He also set forth the doctrine of the church, opposing warfare and service in the armed forces, as set forth in their Constitution. (Ex. 121, 123)

During the summer of 1963, appellant held a brief conversation with Mr. Friddle, the local minister of his church. From this conversation he was further led to believe that his work at Boeing was permitted in the eyes of his church. (T. 33; Ex. 61)

To further insure acceptance of his conscientious objector claim, the appellant even transferred from his position of draftsman on test equipment, to the aircraft division of Boeing. There his work as draftsman pertained only to unarmed cargo planes. (T. 33, 34, 43)

An extensive investigation was made of the appellant's background by the F.B.I. The resume of this investigation cites seventeen different witnesses. None of the witnesses gave statements against the sincerity of the appellant's conscientious objector beliefs. Nine of these actually gave affirmative statements that they felt he was sincere in his claim. (Ex. 84-100)

On December 4, 1963, the appellant attended the hearing before the special Hearing Officer for the Department of Justice. He was accompanied by Mr. Lindberg as a witness. (App. B)

The appellant specifically asked the Hearing Officer if his work at Boeing was wrong or if it hurt him in any way. The Hearing Officer's reply was, "It doesn't matter to me." (T. 34, 50) The Hearing Officer did not advise the appellant

that he had a right to have an attorney, to have him present during the hearing, or of his right against self-incrimination. (T. 35, 50) He advised the appellant that his chances of receiving a I-O classification "looked very favorable." (T. 41, 50)

The appellant stated, as his grounds against noncombatant duty, that if he participated in a killing organization he would be partaking of their sins and would be just as guilty as they; that God commands him not to become a slave to man by entering into the military, and other religious reasons. (T. 37, 50; Ex. 59, 61)

The special Hearing Officer filed his recommendations with the Department of Justice. (Def's. Ex. A-1; App. B.) He found that the appellant was sincere in his representations as to religious training and belief, that he was in fact a conscientious objector to combatant military service, but that there was nothing within the limitations of his religious training and belief that would prohibit "his service in a noncombatant capacity or in an area of assigned public work." (App. B, p. 4)

The Department of Justice filed its report with the Appeal Board and recommended the appellant be classified I-A-O. Their basis was the appellant's alleged statement to the local board of his desire to preach; the fact that he filed his conscientious objector claim after his physical and divorce; that he worked at Boeing and the Hearing Officer's conclusion that there was nothing in the appellant's religious training and belief that would prohibit noncombatant duty. (Ex. 74-82)

During 1965, the Headquarters church, of appellant's faith, received word that the local church in Seattle was teaching that defense work was acceptable in the eyes of the church. A ministerial counsel was held at Headquarters and their true position against defense work verified. (Ex. 67; T. 35, 36, 53, 54)

When this word was communicated to the Seattle church the appellant quit his job at Boeing, as well as many other church members. (Ex. 55; T. 35, 36, 53, 54) The appellant notified the Appeal Board he quit Boeing. (Ex. 55)

Immediately after the church in Seattle was notified of the Headquarter's decision regarding defense work, the local minister wrote the appellant's Appeal Board. (Ex. 58) In the letter he denied that either he or the church sanctioned appellant's working at Boeing and gave the misimpression that appellant had misstated the character of his work to him.

The minister never told the appellant he sent the letter. The Appeal Board never notified the appellant it was received or gave him any opportunity to rebut it. The appellant had no knowledge of the letter's existence from any other source. (T. 36, 37)

On April 20, 1964, the Appeal Board classified the appellant I-A-O. (Ex. 10)

On June 5, 1964, an attorney representing the appellant, wrote the local board. (Ex. 46) He called to their attention events that had occurred subsequent to the appellant's personal appearance before the board and prior to the induction order being issued, and requested the classification be reopened.

The new information submitted was the fact that the appellant was baptized into a church professing principles of conscientious objection (Ex. 121) and that he quit his job at Boeing after the misunderstanding regarding this work was clarified. (Ex. 55)

The local board met on June 5, 1964, to consider the appellant's file. They informed the appellant's attorney that the "information submitted did not warrant requesting the authority of the State Director to reopen the classification." (Ex. 120)

Appellant was ordered to report for induction on June 9, 1964. (Ex. 51) He refused induction.

Through the foregoing Selective Service process the appellant clearly made out a prima facia case sustaining his conscientious objector claim as evidenced by some of the following:

Ten character references were filed on his behalf testifying to his sincerity. (Ex. 147, 149, 151; Govt's. Ex. 2)

The Hearing Officer found him to be sincere in the representation of his religious training and belief. (App. B, p. 4)

The F.B.I. knowingly questioned at least seventeen witnesses. None of these gave any evidence of his being insincere. Nine actually confirmed his sincerity. (Ex. 84-100)

The trial court, who had the opportunity to observe the appellant, at the time of his finding of guilty stated, ". . . (S)o far as my own view is concerned, I don't know, Mr. Storey may be most sincere in his claim throughout." (T. 1/22/66, p 4) Then at the time of the sentencing again stated, ". . . (Y)ou are not going to need rehabilitation so far as your moral character is concerned. There's nothing to indicate that you have any criminal tendencies as we ordinarily perceive that tendency." (T. 2/25/66, p 4)

The formidable doctrinal requirements of appellant's church, adhered to by him, are summarized in Appendix F.

QUESTIONS PRESENTED AND HOW RAISED

I

After a local board and a Hearing Officer for the Department of Justice refused to answer an appellant's plea for information as to whether or not his job constituted defense work, can the Justice Department then utilize the very point the appellant was kept ignorant of as a basis in fact for denying his conscientious objector claim?

This question was raised by ground five of the Motion for Judgment of Acquittal. (R7)

II

Whether an Appeal Board can receive ostensibly derogatory information unknown to the appellant, not inform him so as to deprive him the opportunity of explaining it as he was able to do, and still validly classify the appellant in an unacceptable classification?

This question was raised by ground two of the Motion for Judgment of Acquittal. (R 3)

III

Can a local board receive information requesting a reopening of appellant's claim and then validly refuse to do so under a misunderstanding of the law giving rise to an erroneous and illegal standard?

This question was raised by ground eight of the Motion for Judgment of Acquittal. (R 4)

IV

Can the local board, after receiving new information justifying a change in the appellant's status, arbitrarily and without a basis in fact refuse to reopen his classification?

This question was raised by ground seven of the Motion for Judgment of Acquittal. (R4)

V

Does an ambiguous Hearing Officer's recommendation to the Department of Justice, and the arbitrary resolving of that ambiguity by the Department of Justice in the recommendation to the Appeal Board, violate due process?

This question was raised by ground four of the Motion for Judgment of Acquittal. (R 3)

VI

Whether the appellant's I-A-O classification is a basis in fact or whether it is arbitrary and capricious?

This question was raised by ground three of the Motion for Judgment of Acquittal. (R 3)

VII

Was the Department of Justice's recommendation to the Appeal Board predicated on an illegal basis when it sought to adopt the Hearing Officer's limited meaning and definition of appellant's religious beliefs?

This question was raised by ground six of the Motion for Judgment of Acquittal. (R 3)

VIII

Whether the failure of the special Hearing Officer for the Department of Justice to advise the appellant of his right to an attorney and of his right against self-incrimination, violated the appellant's rights under the Fifth and Sixth Amendments of the U. S. Constitution?

This question was raised by ground one of the Motion for Judgment of Acquittal. (R 3)

IX

Whether the Court properly denied the introduction of the witnesses' testimonies?

This question was raised by objections to testimonies and offers of proof. (T. 46, 47, 49-54)

SPECIFICATION OF ERRORS

I

The District Court erred in failing to grant the Motions for Judgment of Acquittal made at the close of the Government's case and at the close of all evidence.

II

The District Court erred in convicting the appellant and entering a judgment of guilty against him.

III

The District Court erred in denying the admission of certain testimony offered by witnesses for the appellant:

Testimony of Gerald Lindberg

Grounds urged for objection were "heresay" and "improper." (T. 46, 47) Objections were sustained. (T. 47)

The full substance of the evidence rejected was that the witness and appellant had the same job at Boeing. That a ministerial assistant from appellant's church told the witness that the work they were doing was permissible in the eyes of God and the church. (T. 47)

Grounds urged for objection to other portions of the testimony were: "The Court: I am not, I have no right to make any judgment on this other than whether or not there is anything in the record . . . Mr. Swofford: That is the reason I objected." (T. 49) Objection sustained. (T. 49, 51)

The full substance of the evidence rejected was that Mr. Lindberg accompanied Mr. Storey as a witness during the hearing before the Hearing Officer. That appellant's religious ground for noncombatant duty was that he could not become a slave to man, the idea that he could not become a part of any killing organization and that God was avenger. That appellant asked about his job at Boeing and the Hearing Officer answered it was immaterial to him. That

the Hearing Officer thought his recommendation would be favorable. That the Hearing Officer never advised him of his right to see an advisor or appeal agent or to have an attorney at the hearing or to remain silent. (T. 50)

Testimony Of Donald Roulette

Grounds urged for objection were, "We have an affidavit in the file . . . The facts and information are in the file." (T. 52) Objection was sustained. (T. 52)

The full substance of the evidence rejected was that the witness had a conversation with the appellant in which the appellant asked whether or not their work at Boeing was right in the church's eyes. That the witness related a conversation with the ministerial assistants from the appellant's church in which they stated that it was acceptable and permissible in the eyes of the church. (T. 52)

Testimony Of Valdon White

Grounds urged for objection was, "We are getting into hinterland." (T. 53)

The objection was sustained. (T. 53)

The full substance of evidence rejected was that the witness was a minister of appellant's church in Seattle, Washington. That the Seattle church, prior to June, 1964, condoned its members working in a job that would be considered defense work. That subsequent to June, 1964, the Seattle church was advised by the Headquarters church that the teaching was error. That as a result of this, fifteen church members quit or transferred from Boeing, and Mr. Storey was one of them. That he had known Mr. Storey for over three years and, in his opinion, Mr. Storey was sincere in his conscientious objector claim. That as a minister, he had experience in seeing men truly become sincere conscientious objectors within a relatively short time. (T. 54)

ARGUMENT

I

THE LOCAL BOARD'S FAILURE TO RESPOND TO APPELLANT'S INQUIRY, OR TO REFER HIM TO A SOURCE FOR ADVICE – A SELECTIVE SERVICE APPEAL AGENT OR ADVISOR – DEPRIVED HIM OF CRUCIAL COUNSEL AND ADVICE AND INDUCED HIM INTO THE VERY CIRCUMSATNCES UPON WHICH SELECTIVE SERVICE IS DENYING HIS I-O CLASSIFICATION.

The appellant was working at Boeing when he embraced the principles of conscientious objection. (Ex. 155, 156). Desirous of doing all that he could to insure acknowledgment of his beliefs, the appellent wrote the local board and asked:

> "If you believe this to be defense work, then I will transfer to the Dyna Sour Program (which is for peaceful use) or quit immediately and take my chances of finding another job. Please let me know if my job is considered defense work and what I should do." (Ex. 153)

The local board never did answer the appellant's plea for advice. It never referred him to the Government appeal agent or any one of the three Selective Service advisors. (T. 27, 32) They chose to simply ignore it.

When the appellant appeared before the special Hearing Officer, he even pursued the point. He asked, regarding his job, "Is this wrong or would this hurt me in any way?" The Hearing Officer replied, "It doesn't matter to me." (T. 34)

But apparently it did matter to the Department of Justice! For they very candidly castigated the appellant's employment in their recommendation to the Appeal Board. Quoting, no less, seven cases to confirm their attitude. (Ex.

80) This case would not be before the Court today had the Government been equally as willing to inform appellant when he sought this information on two occasions.

Let us recall that the appellant was classified I-A-O. The only ostensible basis in fact for this classification was that the appellant worked at Boeing. (This point is fully developed under Point VI.)

Now let us recognize this for what it is! The local board wilfully refuses to answer the appellant's inquiry or refer him to an advisor. The Hearing Officer does likewise. This silence induces and lulls the appellant into maintaining his status quo. Into a situation of inaction. Now we find the Government attempting to take advantage of the very situation they, themselves, have engendered.

A course of conduct hardly according to Hoyle — to say the least. Case law so confirms.

The controlling case on this point is found in *U.S. v. Liberato,* 109 F. Supp. 588 (W.D. Pa. 1953). There the registrant was classified I-A by the Appeal Board. He was sent a form to sign, concerning I-W work, which provided it was subject to "such regulations as the President shall prescribe." There as here the local board did not respond.

On page 590 the Court straightway resolved the point in favor of the defendant and stated:

> "By reason of the draft board's failure to furnish defendant such information as requested, from which defendant could have rendered a precise and unequivocal answer as to his willingness to make himself available for a work assignment to be determined by the President of the United States, it is my judgment that the Government has failed to establish beyond reasonable doubt defendant's evasion of the Selective Service Act, and defendant is adjudged not guilty."

In another case of *Glover v. U.S.*, 286 F. 2d 84 (8th Cir. 1961) we find a circumstance in which the local board sent

a fifth classification notice to the registrant which only advised him "in form," but not specifically, the reason for it. The Court reversed the conviction. The strong language used in doing so, on page 90, is equally applicable when applied to the facts before us:

> "While this fifth notice did again, in form, notify appellant of his right to appeal, the failure on the part of the board to explain to or inform defendant of the reason therefor (whether intentional or not) effectively deprived him of knowledge of the significance of such action. Such knowledge was essential to an understanding of his rights and of the necessity of further action by him to enable him to properly exercise and protect his rights. In the absence of such explanation or additional information, the appellant might, as a reasonable person, assume and believe that nothing further was required or could be done.
>
> "There was no further reason for writing anymore. Under the existing circumstances we believe *the board owed a duty to appellant* to advise him as to the reason for the fifth classification notice, and that its failure to do so was *arbitrary, unfair and tantamount to the withholding of vital and essential information to which he was entitled as a basis for the exercise of his rights.*" (Emphasis added.)

Other applicable cases are:

U.S. v. Giessel, 129 F. Supp. 223 (D. N.J. 1955). Defendant did not appeal within the ten day limitation period. At no time was he apprised of his right to consult with the Selective Service advisors nor did he see any notice posted regarding them, nor was any such notice called to his attention. On page 225 the court held that this combination of events innocently misled him and deprived him of his procedural rights.

U.S. v. Derstine, 129 F. Supp. 117 (E.D. Pa. 1954). Registrant filed a request for an appeal "or" a personal ap-

pearance before the local board. The local board gave an appeal. The Court said on page 120 that he was entitled to an appearance before the local board and that any time that a registrant makes a request, no matter how ambiguous or unclearly stated, the writing should be construed in favor of the registrant and the local board should contact him for clarification.

For another very interesting aspect let us look at a Selective Service form letter sent by the local board to the defendant. Here we find the local board affirmatively seeking the Defendant's reliance on their advice. We read:

> "Whenever you are in need of Selective Service advice or information, call on or write to your local board. If neither is feasible, any other local board will be glad to help you." (Ex. 173)

This is general form letter "LB Ltr. 0-5" issued by Selective Service. A similar letter can be found issued by Local Board #16, Everett, Washington, on page 65 of Selective Service file #45-16-44-486.

The wording of such forms, of course, is not just mere verbiage. They are approved by the National Director of Selective Service and have *the force and effect of law.* (32 C.F.R. 1606.51)

The local board's duty to advise and aid a registrant can be seen in *Uffelman v. U.S.*, 230 F. 2d 297, 300, 301 (9th Cir. 1956); *U.S. v. Sutter,* 127 F. Supp. 109, 119 (D.C. Cal. 1954).

The wisdom and rationale behind this duty is sound. As was so aptly stated in *U.S. v. Scott,* 137 F. Supp. 449, 454 (E.D. Wis., 1956), the mere fact that the Regulations provide for appointments of advisors indicates that Selective Service does not expect the registrants to know the Regulations and cases interpreting them. That this indicated the

Government wanted to protect the rights of the registrants that were afforded them under the Regulations and the law.

In a recent conscientious objector case decided January, 1966, the Court verified this need when it stated, "It is always difficult to obtain counsel to defend an unpopular cause, especially in a time of active hostilities." *U.S. v. Mitchell,* 354 F. 2d 767, 769 (2nd Cir. 1966). The Court then went on to state that even counsel must have time to familiarize himself with the "various intricacies of the Selective Service law."

In conjunction with this we ask the Court to consider *Cox v. Wedemeyer,* 192 F. 2d 920 (1951), where the Ninth Circuit pointed out that draft registrants are "unskilled in legal procedure . . . and none of them represented by counsel." (922-923). Also compare *U.S. v. Craig,* 207 F. 2d 888 (1953), where the Second Circuit declared: "Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel (891)."

The appellant manifested his clear intention and desire of doing what was right in the eyes of Selective Service in order to have his conscientious objector claim honored. Indeed, he did what he could commensurate with the knowledge he had. If either the local board, or Hearing Officer, had advised the appellant of the Government's view toward his type of work, or at least referred him to an advisor or appeal agent for the answer, the appellant would have terminated his employment. (Ex. 153; T. 32) As indeed he did quit promptly upon learning that his religion considered such work improper. (T. 35; Ex. 55)

Refusal of the local board, and the Hearing Officer, to respond to a bona fide inquiry for advice is arbitrary and unfair. It is tantamount to entrapment and violates the appellant's rights under the due process clause of the Constitution.

II

THE APPELLANT WAS DENIED DUE PROCESS WHEN OSTENSIBLY DEROGATORY AND ADVERSE EVIDENCE WAS PLACED BEFORE THE APPEAL BOARD THAT HE WAS NEVER INFORMED OF NOR AFFORDED THE OPPORTUNITY TO REBUT.

On April 3, 1964, a minister of appellant's church mailed a letter directly to the Appeal Board, containing information which, unless clarified, was highly derogatory to the appellant. (Ex. 58) The letter concerned, among other things, the appellant's employment at Boeing. The very crux of the Government's alleged basis in fact. The letter provided:

> "The Resume of the Inquiry of Mr. Kenneth Gerald Storey, Jr., Conscientious Objector, page 4, eludes to the assumption that I sanctioned Mr. Storey working on missiles either directly or indirectly. Neither the Radio Church of God nor I teach that anyone should work on anything even remotely connected to the military.
>
> "All the details were not explained concerning his work. I was under the impression that the capacity of his work was for civilian rather than military purposes."

The minister did not send a copy to the appellant. The Appeal Board never informed him they received it. When the local board reviewed the appellant's request to reopen, they never notified him of it. The appellant, in fact, never knew of this letter. He was deprived of the opportunity to explain it and clarify its meaning. (T. 36, 37)

Here we have a letter which, without further clarification, leaves the impression that the registrant was a rebel regarding obedience to church doctrine, that he misstated certain facts, and that he was working at Boeing contrary to the teaching of the church. The appellant was and is readily able to explain away these misimpressions. (T. 33, 29-41; Ex. 90-92)

The right to be forewarned of any ostensibly derogatory information filed with the local board, and the opportunity to clarify the same is an integral part of a fair hearing.

In *Gonzales v. U.S.*, 348 U.S. 407 (1955) a registrant was not afforded the opportunity to rebut adverse evidence in the Department of Justice's recommendation to the Appeal Board. In reversing the conviction the Court commented:

> Page 415, "Just as the right to a hearing means the right to a meaningful hearing, *U.S. v. Nugent; Simmons v. U.S.*, supra, so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendation and argument to be countered."
>
> Page 416, "... the local board made use of evidence of which (the registrant) may have been unaware, and which he had no chance to answer; a prime requirement of any fair hearing."

A similar position was taken in the 9th Circuit case of *Chernekoff* 219 F. 2d 721 (1955). Here the Draft Board's file contained information of an apparent derogatory nature. The registrant never knew of this data being considered and never had a chance to explain the same.

The Court there stated very succinctly:

> Page 723, "The fair hearing essential to meet minimum requirements of any accepted notion of due process includes the opportunity to know of adverse evidence and to be heard concerning its truth, relevancy and significance. Otherwise such a hearing is in violation of the 'concept of ordered liberty'." (Cases cited.)

Chief Justice Warren recently spoke out on this very

subject. He expressed its importance and the intent of the Court to protect the right from "erosion." The Court's statements are found in *Greene v. McElroy*, 360 U.S. 474, 496 (1959), in which it is stated:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue . . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, (Cases cited) but also in all types of cases where administrative and regulatory actions were under scrutiny. (Cases cited)"

It is well founded that the use of this secret knowledge by the board, without affording the defendant the opportunity to rebut, is no technical irregularity. As Judge Learned Hand said, "It went to the very heart of controversy and vitiated the whole proceeding." *U.S. v. Cain*, 149 F. 2d 338, 342 (2d Cir. 1945) and cases cited therein. See also: *U.S. v Toon*, 151 F. 2d 778, 780 (2d Cir. 1945); *U.S. v. Everngam*, 102 F. Supp. 128, 131 (S. D. W. Va. 1951).

Being deprived of an opportunity to clarify this matter for the Appeal Board, and to focus the local board's attention to his explanation on his request for reclassification, blatantly denied the defendant a fair hearing and consequently violated due process.

III

THE LOCAL BOARD MISINTERPRETED AND MISAPPLIED THE REGULATIONS WHEN IT CONSIDERED THE NEW INFORMATION, FILED BY APPELLANT, UNDER THE ERRONEOUS IMPRESSION IT HAD TO WARRANT THE AUTHORITY OF THE STATE DIRECTOR TO REOPEN.

After the appellant filed his Special Form for Conscientious Objectors, he was granted a personal appearance hearing before the local board. Subsequent to that hearing your appellant filed new information with the local board, to wit: That he was baptized (Ex. 121), that his continued working at Boeing was due to a misunderstanding between his minister and himself and that he had now terminated his employment at Boeing. (Ex. 55) Also, verification of said information was received from the appellant's attorney. (Ex. 46)

The local board considered the new information but refused to reopen the appellant's classification. It gave its reasons in a letter to his attorney in which it said:

> "Serious consideration was given your request but it was their determination that no action would be taken as information submitted did not warrant requesting the authority of the State Director to reopen the classification." (Ex. 120)

(A) The Local Board Violated the Defendant's Right of Due Process When It Applied an Erroneous Rule of Law.

The regulation pertaining to reopening, 32 C.F.R. 1625.2, provides:

> "The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not con-

> sidered when the registrant was classified which, if true, would justify a change in the registrant's classification . . ."

Now the standard for reopening a classification is clear. The standard is, "Will the new information justify a change in the classification," not "Will it warrant requesting the authority of the State Director to reopen it."

It is impossible to determine what type or quantity of new information that the local board felt was needed to "request the State Director to reopen." But regardless of whatever it was, it is clear that the local board considered the appellant's new information under an erroneous impression as to the existing law.

The power of classification is exclusively vested in the local boards, subject only to the right of appeal. (50 U.S.C.A., App., Sec. 460(b)(3); 32 C.F.R. 1622.1(c))

"Errors of law," however, must be rectified by the Courts, *U.S. v. Downer*, 135 F. 2d 521 (2nd Cir. 1943). This is exactly what the Courts have done.

In the 9th Circuit case of *Stain v. U.S.*, 235 F. 2d 339 (9th Cir. 1956), a registrant filed his Special Form for Conscientious Objectors after his physical was taken, but before the Induction Notice was issued. The local board ruled not to reopen the classification on the erroneous grounds that the form was filed after the physical had been taken.

The Court declared the Induction Order invalid and stated:

> Page 343, "We hold that the procedure followed by the board, in arriving at its ruling denying the Petition to Reopen and Reclassify, was illegal and deprived appellant of due process of law and that he was prejudiced thereby."

In another case the registrant submitted a ministerial certificate and two affidavits. The board refused to reopen

his classification on the grounds that Jehovah's Witnesses were not a recognized church. The court labeled this an "erroneous theory" and stated:

> Page 424, "Since the board's refusal to reopen and consider the defendant's classification was founded upon this erroneous theory, a belief of the board members, the board's orders to the defendant . . . was a nullity." *U.S. v. Henderson*, 223, F. 2d 421, (7th Cir. 1955).

In *U.S. v. Kose*, 106 F. Supp. 433, (D.C. Conn. 1951), the local board denied a registrant's ministerial claim. The majority of the board admitted they did not act upon the definition of a minister as stated in the Act. In discharging the defendant it was said:

> Page 435, "When it is questioned in a criminal proceeding, however, it is open to the defense to show if the board had an erroneous interpretation of the law in that respect in arriving at its conclusion. . . . There was *evidence* before them on which they *might have determined that he was not a minister*, but since they were not acting on a proper interpretation of the rule to be applied, we cannot tell . . . whether they would have arrived at the same conclusion." (Also see *U.S. v. Kezmes*, 125 F. Supp. 300 (D.C. Pa. 1954). (Emphasis ours.)

(B) The Local Board's Relinquishment of Its Right to Reclassify to the State Director Violated Its Statutory Duties.

In misinterpreting and erroneously applying the law in the manner in which they did, the local board also admittedly abdicated its discretionary duty of reclassification to the State Director.

In *Ex Parte Asit Ranjan Ghosh*, 58 F. Supp. 851 (S.D. Cal. 1944), a writ was granted. The Court stated on page 857, "And the State Director is not empowered under the

Act to promulgate rules or regulations nor to substitute his judgment for that of the local or Appeal Boards."

In *U.S. v. Cain*, 149 F. 2d 338, (2 Cir. 1945), the Court reversed an order where a writ had been denied. It appeared the local board had made use of a report by a panel of experts. The opinion, by Judge Learned Hand, held that such use must be a restricted one, that ". . . they must not be made a substitute for the boards themselves." (Page 341.) The Court concluded that the form of the recommendation made it improper for the board to act upon, that ". . . it was a decision upon the very issue to be decided." (Page 341.)

In *Eagles v. Samuels*, 329 U.S. 304, 315 (1946), our argument by analogy is further supported. There, the Court stated:

> "It is plain that the local boards and the Boards of Appeal may not abdicate their duty by delegating to others the responsibility for making classifications. That is their statutory function. Section 10 (a) (2.)"

Therefore, the order to report on which the conviction is based was not in conformity with the established administrative process but was "outside" the administrative process. Compare *U.S. v. Peterson*, 53 F. Supp. 760 (D.C. Cal. 1944), where, in this very early statement on the subject by Judge St. Sure the law was so stated (page 762), this holding never being criticized by any of the many hundreds of subsequent draft cases. Also see *Knox v. U.S.*, 200 F. 2d 398, 401 (9th Cir. 1952).

(C) When The Local Board Fails to Exercise A Discretionary Function It Is Not Within the Power of the Court To Exercise That Function For Them.

It is not the contention of your appellant at this point, that the local board abused its discretion in not reopening. Indeed, how could it abuse its discretion when it never

properly considered the question in issue? Our contention is that it did not properly evaluate the appellant's new information because it was under an erroneous impression of law.

What then is the result? What would the board have decided if it did consider the merits of the appellant's request? Would they have reopened?

The answer is, we don't know! The Government has the burden of proving the appellant guilty beyond a reasonable doubt. Therefore, we certainly cannot simply conclude that they would not have reopened.

Cases have considered this general principle of law. The conclusion of them is that it is for the local board to decide and not the Court. Therefore, a Motion for Judgment of Acquittal is in order.

> It is "a simple but fundamental rule of administrative law . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). See also *Austin v. Jackson*, 353 F. 2d 910, 912 (4th Cir. 1965).

We also read in *Stain v. U.S.*, 235 F. 2d 339, 343 (9th Cir. 1956):

> "We are not holding that the board could, or could not, have determined from the evidence that there was a basis in fact for the denial . . . that question was one that the board should have answered but it did not." The court declared the Induction Order invalid. Also see *U.S. v. Romano*, 103 F. Supp. 597, 600 (S.D.N.Y., 1952).

In applying an imaginary rule as they did, the appellant was deprived of the right to appear before the local board.

orally discuss and explain his evidence in detail, and of having the board personally evaluate the sincerity of his changed position. This would also include the special appellate procedures afforded a conscientious objector. (*Shepherd v. U.S.*, 217 F. 2d 942 (9th Cir. 1954); 32 C.F.R. 1625.11; 1624.2; 1625.13; 1626.25; 50 USCA App. Sec. 456(j).

IV

THE LOCAL BOARD ACTED ARBITRARILY AND WITHOUT A BASIS IN FACT WHEN IT REFUSED TO REOPEN THE APPELLANT'S CLASSIFICATION AFTER RECEIVING NEW INFORMATION REGARDING A CHANGE IN HIS STATUS.

The Selective Service regulations provide that no classification is permanent. (32 CFR 1625.1) They also establish lish the basis for reopening a classification. The grounds are found in 32 CFR 1625.2 which provides in part:

> "The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification . . ."

There are two elements. First, the information must not have been previously considered; the second, if true, that it would justify a change in the classification. Are these two elements fulfilled in your appellant's case?

Let us first consider if facts not previously considered were filed.

While working at Boeing the appellant embraced the principles of conscientious objection. (Ex. 155, 156) He filed his conscientious objector form. His personal appear-

ance hearing was held at the local board on May 20, 1963. The local board classified him I-A and he appealed. Between the time of the appellant's appearance before his local board on May 20, 1963 (Ex. 20), and the local board's convening to consider his new information on June 15, 1964 (Ex. 120), your appellant filed the following:

Written information (1) that he had quit his job at the Boeing Company (Ex. 55); (2) that his employment at Boeing, after embracing the principles of conscientious objection, was due to a misunderstanding between his minister and himself (Ex. 55) and (3) that he had become a baptized member of the Church of God. (Ex. 121)

As the record will conclusively bear out, this information was filed subsequent to the May 20th meeting of the appellant's local board. So the first element for reopening is met.

Now let us consider, assuming this information to be true, if it would justify a change in the appellant's classification.

Let us recall that appellant was classified I-A-O by the Appeal Board. Also, as Point VI of this brief clearly develops, the only ostensible basis for this classification was the fact that the appellant was working at Boeing. The Government contended that this was defense work.

The information filed then, showed the changed attitude of appellant toward "defense work." It showed a change in the willingness to perform the type of work that the Department of Justice considered as defense work. In other words, there was a change in the very circumstances upon which the Government is attempting to predicate its basis in fact. As can be seen, the basis in fact then actually no longer existed. And if the local board had reopened and given appellant his right to further explain this evidence (32 CFR 1624.2) they would have learned that he transferred to

working on civil aircraft as long ago as November 21, 1963. (T. 33, 34)

The board would have also further learned, had they reopened, and given appellant the opportunity to explain the evidence, a full explanation of the misunderstanding between the minister and himself that resulted in his working at Boeing after becoming a conscientious objector. (T. 33)

The fact of appellant's baptism was indicative of his sincere noncombantant convictions, as it showed his further adherence to the doctrines taught by his church — one of which was opposition to noncombatant duty. (Ex. 121)

It would appear to be clear, that as the foregoing facts struck right at the heart of the Government's alleged basis in fact, that these facts would justify a change in the appellant's classification. Both elements of the regulation pertaining to reopening having been met then, it is respectfully submitted that it was prejudicial error for the local board not to do so.

The counsel for appellant wants to clarify, however, that he is not contending that the local board had a duty to "reclassify" appellant. That's for the board to decide. He does contend, however, that the local board did have the duty to at least "reopen" appellant's classification, grant him the required hearing (32 CFR 1624.2) so he could discuss the new information and the board could determine the sincerity of his attitude.

The failure of the local board to at least "reopen" has been considered in many cases.

A case on this point is the 9th Circuit case of *Stain v. U.S.*, 235 F. 2d 339 (9th Cir. 1956). There the registrant was classified I-A. He subsequently filed a Special Form for Conscientious Objectors. The board refused to reopen his classification. In reversing his conviction the Court stated:

> Page 342, "Under the Regulations (Sec. 1625.4), if, in the local board's opinion, his filled-in Form 150

contained information in addition to that considered when appellant was classified I-A and/or "new facts," which presented a prima facie case for a conscientious-objector classification, the local board should have reopened the record *for the determination* of whether appellant was entitled to the change requested." (Emphasis ours.)

Also in accord is *Brown v. U.S.*, 216 F. 2d 258, (9th Cir. 1954) in which it was stated:

> Page 260, "If a change of status *was declared*, it was the *duty* of the local board to take it into consideration and to classify him in the light of the new evidence presented." (Cases cited.) (Emphasis ours.)

As also provided in *Townsend v. Zimmerman*, 237 F. 2d 376, (6th Cir. 1956), on page 377:

> "Though the language in the regulation is permissive merely that does not mean that a local board may refuse to open arbitrarily, but requires it to exercise sound discretion. That, in turn, requires, when the basis of an application is not clearly frivolous, an inquiry designed to test the asserted facts sufficiently to give the board a rationale basis on which to put decision."

See also *Schuman v. U.S.*, 208 F. 2d 801, 804 (9th Cir. 1953); *U.S. v. Peebles*, 220 F. 2d 114, 118 (7th Cir. 1955); *Taffs v. U.S.*, 208 F. 2d 329 (8th Cir. 1953); *U.S. v. Hagaman*, 213 F. 2d 86 (3rd Cir. 1954). For a well-written general discussion of Dickinson and Estep see *Batterton v. U.S.*, 260 F. 2d 233, 236 (8th Cir. 1958).

It has been further establised that the local board needs a basis in fact to justifiably refuse to reopen a regristrant's classification.

As provided in the case of *U.S. v. Ransom*, 223 F. 2d 15, 17 (7th Cir. 1955):

> "The local board should not be able to escape the requirement of a basis in fact by simply refusing to re-

open a registrant's file and consider it further. If a registrant makes a prima facie showing of right to a new classification, the board cannot refuse to give it to him unless it has at least a basis in fact for that refusal. We regard this as a necessary corollary to, if not the same as, the rule laid down in the Estep and Dickinson cases, supra.

"If a registrant presents a prima facie case for a new classification, the mere fact that his file has previously been closed is not a basis in fact for refusing the requested classification. When such a prima facie case is presented and the board has no basis for refusing the requested classification, it must investigate further. If further investigation fails to disclose any basis for refusing the registrant's requested classification, it must be granted."

See also *U.S. v. Scott,* 137 F. Supp. 449, 453 (E.D. Wis. 1956); *U.S. v. Hestad,* 248 F. Supp. 650, 654 (W.D. Wis. 1965).

That the appellant made out a prima facie case is readily demonstrable. For a capsule review of appellant's evidence substantiating his claim, see App. G and F.

This reopening of appellant's classification would have resulted in giving him the right of a personal appearance before his local board, the right to present further evidence to them (32 CFR 1624.2 (b)) and in the event they place him in an unacceptable classification, the right to a Special Appellate Procedure offered under Section 6 (j) of the Act and Section 1626.25 of the Regulations. See *Witmer v. U.S.,* 348 U.S. 375 for a more elaborate discussion of the rights that appellant was deprived of.

The undisputed effect of a registrant being denied a basic right was summarized in *Knox v. U.S.,* 200 F. 2d 398, 401, (9th Cir. 1952), in which it was stated:

"So far as we are aware it is the uniform view of the Courts passing on the subject that failure to accord

a registrant the procedural rights provided by the regulations invalidates the action of the draft board."

V

THE DEPARTMENT OF JUSTICE'S RECOMMENDATION TO THE APPEAL BOARD DENIED APPELLANT DUE PROCESS IN THAT IT WAS AN UNFAIR RESUME OF THE ORIGINAL HEARING OFFICER'S RECOMMENDATION, AND THE ORIGINAL HEARING OFFICER'S REPORT WAS ARBITRARY, CAPRICIOUS, AMBIGUOUS AND UNFAIR.

The original Hearing Officer's report found the registrant to be sincere. It provided "The registrant appeared to be sincere in his representations as to his religious training and belief." (App. B, p. 4) It then went on and in the "Conclusion" provided:

> "(T)here is nothing in registrant's situation that would *prohibit* his service in a noncombatant capacity *or in the area of assigned public work.*" (Emphasis added.)

After stating these conclusions the Hearing Officer continued under the "Recommendation" portion of his report:

> "Based upon the conclusions reached as the result of this hearing, it is recommended that the registrant's appeal be allowed in part and that he be classified as a conscientious objector to combatant military service, but that he *not be exempted* from noncombatant military service *or service of an assigned public nature* commensurate with the conclusions herein and above stated." (Emphasis added.)

The instructions from the office of the Attorney General, to the Hearing Officer, require that the "Hearing Officer may make one of three possible recommendations to the Department of Justice." The form of recommendation to be used

when a registrant has been found to be qualified for noncombatant duty is:

> "The Hearing Officer recommends that the registrant be exempt from combatant training and service only, and if inducted into the armed forces he be assigned to noncombatant training and service as defined by the President." (App. E, p. 17)

As can be seen, the Hearing Officer did not make such a recommendation.

The findings and conclusions of the Hearing Officer make it clear that he had some misconception or misunderstanding regarding the relationship of noncombatant service and work under the civilian work program in lieu of induction. (50 USC App. Sec. 456(j))

The recommendation was in fact repugnant. He recommended that appellant be *not* exempted from both noncombatant military service and service under the civilian work program. To put it in the affirmative, he recommended that appellant be *qualified* for both noncombatant service and service under the civilian work program.

It cannot be denied that the recommendation was at least ambiguous. The Department of Justice should have referred the matter back to the Hearing Officer for a clarification as to what was meant by the recommendation. (App. E, p. 18)

Now let us look at the Department of Justice's recommendation to the Appeal Board. How did they summarize this point? How did they resolve the ambiguity? They simply stated:

> "He (the Hearing Officer) recommended that the registrant's conscientious objector claim be sustained as to combatant military training and service only." (Ex. 78)

So the Department of Justice actually misquoted the

recommendation of the Hearing Officer. They omitted the latter part of the recommendation that the appellant "not be exempted from" or, in other words, that he be qualified for, the civilian work program. They actually gave a misconception of the recommendation.

Why did they do this? Either innocently or because the author of the resume recognized the ambiguity and did not want to confuse the Appeal Board.

What is the effect of this misquote of an ambiguous Hearing Officer's recommendation?

As was stated in *DeRemer v. U.S.*, 340 F. 2d 712, (8th Cir. 1965):

> "There is no doubt that once the Department of Justice undertakes to summarize the contents of the Hearing Officer's report . . . it has the obligation to render *a fair summary* . . ." (Emphasis ours).

Certainly this truth could not be questioned.

An applicable comment is found in the case of *Manke v. U.S.*, 259 F. 2d 518, 524 (4th Cir. 1958). There the Department of Justice's recommendation to the Appeal Board stated that there was a division among the witnesses in regards to their views on the Defendant's conscientious objector beliefs. In fact, this was not true. The Court reversed and stated:

> However, we find that there was a *lack of fairness* in the recommendation which was made to the Appeal Board. . . . (I)t would be unrealistic not to conclude that the Appeal Board . . . was influenced largely if not wholly by the recommendation of the Department of Justice. *Goetz v. U.S.*, 216 F. 2d 270 (9th Cir. 1954). Since the recommendation . . . was founded on a mistaken assumption of fact we hold that its consideration by the Appeal Board amounted to a denial of procedural due process. . . ."

A similar conclusion was come to in the case of *U.S. v.*

Everngam, 102 F. Supp. 128 (S.D. W. Va. 1951) where the Hearing Officer's recommendation denied the registrant's claim because he was a Catholic. The Court stated on page 131:

> "The registrant is entitled to have a report and recommendation that is not arbitrary. Without it he is denied due process of law. Had such a report and recommendation been made, who can say that the . . . Appeal Board would not have made a different decision?"

The patent ambiguity in the original Hearing Officer's report to the Department of Justice, and the unilateral resolving of that ambiguity in favor of the Department, materially prejudiced appellant at a crucial point. In the case of the *U.S. v. Cain*, 149 F. 2d 338 (2nd Cir. 1945) the local board made use of a report and recommendation of an advisory panel. The recommendation contained improper matter. Judge Learned Hand said, on page 342:

> "That was no technical irregularity of procedure; it went to the very heart of the controversy and vitiated the whole proceeding."

Also see *U.S. v. Balogh*, 157 F. 2d 939 (2nd Cir. 1947).

The recommendation of the Department of Justice to the Appeal Board was also unfair in that it cited the case of *U.S. v. Corliss*. It failed to mention that this was a Second Circuit, not a Ninth Circuit case, and therefore, not binding as law in the judicial district in which the board was sitting. They also omitted citing the Ninth Circuit case of *U.S. v. Schuman*, 208 F. 2d 801 which was contrary to Corliss. (Ex. 79, 80) This, thereby, gave the erroneous impression that the Corliss case was the law in the Ninth Circuit. (Further argument on this point from Point VI Sec. A is also applicable here.)

The recommendation was also unfair in implying that by the appellant's filing his conscientious objector claim after

his divorce, aspersions were to be cast on his sincerity. The divorce did not, in fact, make the appellant more eligible for the draft as suggested, inasmuch as he was always classified I-A. (Ex. 78, 79, 10) (Further argument on this point from Point VI A is also applicable here.)

VI

THE I-A-O CLASSIFICATION GIVEN APPELLANT BY THE APPEAL BOARD WAS ILLEGAL, ARBITRARY, CAPRICIOUS AND WITHOUT A BASIS IN FACT.

The registrant has clearly made out a prima facie case regarding the sincerity of his combatant and noncombatant beliefs. (App. G and F)

The Department of Justice found appellant to be sincere in regards to combatant service, but recommended that his claim for noncombatant service be not sustained. It based its recommendation upon four alleged bases in fact.

The sincerity of the registrant is not questioned. Therefore the issue is one of law—whether the alleged bases in fact are legally sufficient.

Counsel will now review each of the bases in fact advanced by the Government.

(A) The Acquisition of the Registrant's Conscientious Objector Beliefs, Subsequent to His Divorce and the Passing of His Physical, Was Not A Basis in Fact to Justify His I-A-O Classification.

The Department of Justice attempted to refute the sincerity of appellant, by drawing attention to the fact that he filed his conscientious objector claim subsequent to being found physically acceptable and after he had been divorced.

There are four unimpeachable reasons why this cannot either legally or logically, rise to the dignity of a basis in fact.

(1) The Government cites the Second Circuit case of *U.S. v. Corliss* as authority for denying appellant his requested I-O classification and for granting him a I-A-O.

The first thing we must do is note what classification the registrant in the Corliss case received and the Court's rationale. There the registrant was classified I-A. It being suggested that the registrant's delayed filing of his conscientious objector claim manifested a motive of attempting to evade the draft at the last moment. The putting forth of a last ditch effort to clandestinely obviate his military responsibilities.

Could such an argument ever be applicable to justify the I-A-O (noncombatant) classification given appellant in this case. Can it be said that by virtue of your appellant's notorious motives they are going to "punish him" by keeping him out of the front lines? Such a conclusion would be illogical.

See Executive Order 128 which defines noncombatant service. (App. E, p. 15)

(2) The rationale of the Second Circuit Corliss case has been refuted by the Ninth Circuit and others. In the Ninth Circuit case of *Schuman v. U.S.*, 208 2d 801 (1953) we read the following:

> Page 804, "We cannot find in the proceedings before the local board any affirmative evidence which controverts Schuman's claim. There are only the suspicions raised by the fact that Schuman did not begin his religious studies until after he had registered for the draft and by the fact that he had not sought exemption until after the Korean War broke out. As the Supreme Court has stated, 'When the uncontroverted evidence supporting a registrant's claim places him prima facie with the statutory exemption, *dismissal of the claim solely on the basis of suspicion and speculation* is both contrary to the spirit of the Act and *foreign to our concepts of justice.*" (Emphasis ours.)
>
> Page 805, "The length of time one has been *con-*

nected with a faith has no bearing upon whether one is entitled to exemption as a conscientious objector. The only question to be considered is whether the registrant has a sincere (i.e., 'conscientious' religious opposition to participation in war in any form. The Hearing Officer concluded that Schuman was 'sincere in his religious belief' but because he had not been 'sincere' long enough recommended that exemption be denied. This is but another example of relying upon suspicion rather than on affirmative evidence." (Emphasis ours.)

Also see *U.S. v. Peebles*, 220 F. 2d 114, 118 (7th Cir. 1955); *Taffs v. U.S.*, 208 F. 2d 329, (8th Cir. 1953); *U.S. v. Hagaman*, 213 F. 2d 86, (3rd Cir. 1954); *U.S. v. Simmons*, 213 F. 2d 901, 905-906 (7th Cir. 1954).

(3) Neither is an adverse implication logically justified from the fact that the appellant filed his claim after his divorce.

The appellant was classified I-A on July 7, 1958 (Ex. 10). He was married during November, 1960 (Ex. 74), but never requested a dependency or hardship classification on this grounds. It must be noted that from 1958, until April, 1964, when the appellant was classified I-A-O, he had always been classified I-A.

In other words, the appellant has always been eligible for induction. He never had a deferred or exempt classification because of his marriage. Therefore, logic dictates that as the dissolution of his marriage in no way affected his eligibility under Selective Service, a divorce would in no way motivate ulterior motives in filing the conscientious objector claim.

The rationale in *Schuman v. U.S.*, 208 F. 2d 801, 804 (9th Cir. 1953), just cited, and the other cases referred to, are equally applicable here as well.

(4) Counsel is firmly convinced that the utilization of

the rationale of Corliss by the Department of Justice, is highly prejudicial and unfair.

The reason being, that any time a registrant files his conscientious objector claim, it is always before or after some step in the Selective Service process of classification. The men register at the youthful age of eighteen years. This, in the vast majority of cases, is long before they embrace the principles of conscientious objection. The only exceptions being the youths who are reared in the fundamental peace churches.

As a consequence, whenever a registrant files his conscientious objector claim it is bound to be after filing his classification questionnaire. Then, of course, it is either "just before" receiving one document or another from Selective Service, or "just after" receiving such a documnt. We might continue on – the claim was filed "just before" receiving his notice to appear for his physical, or "just after" receiving his notice for a physical. The Department of Justice can, and has, used just about any such point as a pivot for the Corliss case.

(B) The Initial Statement by the Registrant That He Based Conscientious Objection on A Desire to Preach Does Not Suffice as A Basis in Fact on the Facts in This Case.

The only evidence of such a basis being suggested by the appellant is a mimeographed questionnaire furnished by the local board, on which the answers were typed in by the clerk. Said form being the purported answers to the questions as given by appellant during his personal appearance hearing. (Ex. 113)

It should be noted that appellant never made this statement as such, but stated that he had filed an application for admission to his church's theological school. (T. 37, 38, 39)

Also, that answers to the form questions were typed in by the clerk, and under the press of being before the local board, appellant never fully read the statement before signing it. (T. 38, 39; Ex. 61, 94)

Even aside from this, the attempt of the Government to rely on this point as a basis in fact discards any possibility for spiritual growth and Bible understanding in a registrant. It also absolutely and totally ignores the wealth and superabundance of other grounds subsequently stated by the registrant. (App. C and F; Ex. 59, 133-135, 145)

As stated in *Sicurella v. U.S.*, 348 U.S. 385, 391 as long as "the requisite objection to participation in war exists, it makes no difference that a registrant also claims, on religious grounds, other exemptions which are not covered by the Act."

Also see *Parr v. U.S.*, 272 F. 2d 416, (9th Cir. 1959); *Kretchet v. U.S.*, 284 F. 2d 561, (9th Cir. 1960) and *U.S. v. Erikson*, 149 F. Supp. 576, (D.C.N.Y. 1957).

(C) Under the Facts in This Case, the Previous Employment by the Appellant at Boeing Did Not Constitute a Basis in Fact for a Denial of the I-O Classification.

The pertinent facts to be considered on this point are that the appellant, prior to understanding his church's teaching on the subject, concluded that his work at Boeing might be improper. He unhesitatingly, innocently and openly, upon first coming to his conscientious objector beliefs, forthwith so informed his local board. (Ex. 156)

He subsequently had a conversation with other church members who were employed at Boeing and was informed that in the eyes of the church such work was not improper. (T. 30, 31, 33, 46-48, 51, 52)

The appellant then wrote the local board and made in-

quiry as to whether or not Selective Service considered his work improper and expressly stated that he would quit if they did. (Ex. 153) No answer was ever received from the local board.

Appellant even transferred employment within Boeing from working on ground-testing material to drafting on non-combatant unarmed aircraft. (T. 33, 34, 43)

The registrant subsequently even made inquiry of the Hearing Officer and asked if his work at Boeing was improper and that he would quit if they considered it as such. The Hearing Officer only stated it was immaterial to him, and never referred the appellant to a Selective Service Advisor or an Appeal Agent. (T. 34, 50)

Subsequently a ministerial conference was held at the Headquarters of appellant's church. The conference was prompted by information that the appellant's local church had condoned its members working in what might constitute defense work. An edict was published that this was not the doctrinal position of the Headquarters church. (Ex. 55, 67, 68; T. 35, 36, 53, 54) Upon being informed of the decision of the Headquarters church, the appellant and others terminated their employment at Boeing. (T. 55)

The effect that working in defense work would have upon a conscientious objector's classification was recently considered in the case of *Harshman v. U.S.*, 372 U.S. 607 (1962).

In that case the Department of Justice also attempted to have a registrant classified I-A-O by virtue of his alleged participating in defense work. The Solicitor General of the United States requested that the Court remand the case to the District Court so the indictments could be dismissed. His recommendation was based on a "confession of error" by the Attorney General. (App. C). On page 11 of the Government's Brief it is stated:

> "The statute leaves no room for a rule of law that willingness to engage in defense production is so incompatible with conscientious objection to military service that, despite unquestioned religious sincerity, a I-O classification may not be assigned to any person willing to work upon goods for the armed forces. By the same token, it is *impermissible to jump*, invariably and automatically, from evidence of willingness to work on war goods to the conclusion of lack of a sincere conscientious objection to noncombatant service." (Emphasis ours.)

Let us apply this to the case before us. Where is the fact or facts that would logically lead us from the appellant's temporary and previous employment at Boeing, to the "conclusion of lack of a sincere conscientious objection to noncombatant service?" Your counsel can find none of record. There are no facts to bridge the gap. The gap was merely leaped by the "impermissible jump" condemned as a matter of law by the Attorney General of the United States.

On page 12 of the Harshman brief, the Solicitor General went on to quote from the Attorney General's Memorandum:

> "Cases can be readily imagined in which the registrant's beliefs would permit some degree of participation by him in some kinds of defense-related civilian activity, yet still would qualify him for the exemption."

Is this not one of the cases to be "readily imagined"? The appellant continued his employment at Boeing under a mistake of fact and a mistake of law. A mistake of fact as to how his church viewed such employment, and by being induced into a mistake of law as to how Selective Service viewed such work in relationship to qualifying registrants for the I-O classification.

The Solicitor General continued his quote from the Memorandum:

> "The issue is generally whether the registrant is

sincere in his claimed beliefs, and logical inconsistency on his part, while always relevant as a factor to be considered, is not necessarily decisive."

The Hearing Officer found the appellant to be sincere in the statement of his religious beliefs. (App. B, p. 4) In this case there is not even any "inconsistency" on the part of appellant. The appellant is not claiming a right to continue working at Boeing. He is not claiming he has a right to work in defense-related industry and still claim a I-O classification. To the contrary, he states that such employment is contrary to his religious beliefs. He claims he cannot conscientiously perform such work. And in accordance with these expressed principles, he terminated his employment at Boeing and subsequently refused defense-related work. (T. 36, Govt's. Ex. 2.)

The Attorney General admits that in certain cases a man can willingly and knowledgeably earn his livelihood and continue in some sort of defense work. Your appellant then is not even willing to go as far as the law will allow him. Certainly, if your appellant's case is not one that qualifies for a I-O, then it would appear that the Attorney General's Memorandum was for nought, and that the Department of Justice is right back making the "impermissible jump."

Consider also that no classification is permanent. (32 CFR 1625.1) And a registrant who engages in defense work could be given a I-A-O classification. Would it not then follow that, this classification not being permanent, circumstances could arise which would result in its being changed? And is it not feasible that one such change of circumstances would be a registrant's change of attitude toward defense work? His quitting defense work once and for all because of his religious convictions? If this were not the case then it would appear that a I-A-O classification, given because of previous defense work, is permanent. That once a registrant

has engaged in defense work he is forever barred from successfully requesting a conscientious objector classification. Such a result would neither be logical nor legal. And it is submitted that the same illogical conclusion is what the Government is attempting to foist upon appellant.

(D) The Hearing Officer's Charge that There Was Nothing in the Appellant's Religious Training and Belief that Would Exempt Him from Noncombatant Service was an Illegal Basis.

This subject was fully developed under Point VII of this brief, and is applicable here. Your Counsel respectfully directs the Court thereto.

VII

THE DEPARTMENT OF JUSTICE BASED ITS RECOMMENDATION TO THE APPEAL BOARD ON AN ILLEGAL BASIS WHEN IT STATED THERE WAS NOTHING IN APPELLANT'S RELIGIOUS TRAINING AND BELIEF THAT WOULD PROHIBIT HIM FROM SERVICE IN A NONCOMBATANT CAPACITY.

Previous, long-established policy of the Department of Justice was broken in this case. Ordinarily appellant was denied access to the Hearing Officer's recommendation to the Department of Justice. Customarily appellant would only receive a resume of the Hearing Officer's report from the Department of Justice. In this case, after being subpoenaed, the original recommendation of the Hearing Officer to the Department of Justice was entered into evidence by stipulation. (App. B)

The Special Hearing Officer specifically found "the registrant appeared to be sincere in his representations as to his religious training and belief." The Hearing Officer went

on to find "It is concluded that the registrant is in fact a conscientious objector to combatant military service based upon his religious training and belief." (App. B, p. 4) Therefore, we know that the basis of the Hearing Officer's recommendation is not based upon the disbelief of appellant or his insincerity.

The Hearing Officer went on and stated, "It is further concluded, however, that, *within the limitations of the registrant's religious training and belief*, such as not working in the area of blood transfusions in hospitals or on Saturdays, there is nothing in the registrant's situation that would prohibit his service in a noncombatant capacity or in an area of assigned public work." (Emphasis added)

The Hearing Officer is not questioning the sincerity of what the appellant believes. He is questioning the meaning, import, extent or "limits" of appellant's religious doctrine.

In short, the Hearing Officer is saying the religious doctrine or teaching that he sincerely believes in, is not of such a nature as would legally "prohibit his service in a noncombatant capacity."

On what religious grounds did appellant predicate his conscientious objection to noncombatant service? The numerous and varied grounds are summarized in Appendix G.

Consider also the constitutional provision of appellant's church, which he was found to sincerely adhere to. It explicitly considers unchristian bearing arms or coming under "the military authority." (Ex. 123 & 145)

Could it possibly be concluded that the foregoing is not sufficient religious grounds, from a legal point of view, upon which to predicate an objection to noncombatant duties? Doctors of Divinity would be hard put to make a stronger case.

The Hearing Officer committed an error of law when he attempted to evaluate and judge whether appellant's

religious beliefs were such as would constitute a basis for a I-O classification.

(A) The Department of Justice is Foreclosed from Evaluating the Scope of a Registrant's Religious Doctrines.

What test has Congress and the Supreme Court prescribed for conscientious objectors? What meaning have they subscribed to "religious training and belief." Section 6(j) of the Act, 50 U.S.C. App. section 456(j) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. *Religious training and belief* in this connection *means* an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." (Emphasis ours)

The construction of the religious aspects have recently been conclusively determined in the Supreme Court case of *U.S. v. Seeger*, 380 U.S. 163, in which it was stated:

> "Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the god of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and

excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets."

It has now been very clearly brought into focus that the issue before the Selective Service System and the Department of Justice is the *sincerity* of a registrant. And we have seen from the Hearing Officer's report, the appellant is sincere.

This was the view taken by the Court in *U.S. v. Jakobson*, 325 F. 2d 409, (2nd Cir. 1963) in which it was stated:

> Page 416, "We cannot believe that Congress, aware of the constitutional problem, meant to . . . require lay draft boards and personnel of the Department of Justice to pass on nice theological distinctions between vertical and horizontal transcendence. See Mr. Justice Jackson, dissenting, in *United States v. Ballard*, 322 U.S. 78, 92-95, 64 S. Ct. 882, 889-890, 88 L.Ed. 1148 (1944)."

This conclusion was confirmed by the Supreme Court in the Seeger case, supra. The language here vividly points out the error of the Hearing Officer in the case before this Court. On page 747 of the United States Supreme Court Reports, Lawyers Edition, we read:

> "*The validity of what he believes cannot be questioned.* Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' *or the truth of his concepts. But these are inquiries foreclosed to Government.* 'Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are real as life to some may be incomprehensible to others.' Local boards and Courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' *Their task is to decide whether the beliefs professed by a registrant are*

sincerely held and whether they are, in his own scheme of things, religious." (*U.S. v. Seeger*, 380, U.S. at 747). (Emphasis ours.)

The standard of Seeger has been applied in two subsequent cases. In *Fleming v. U.S.*, 344 F. 2d 912 (10th Cir. 1965) we find the Court upholding a registrant's views as satisfactorily fulfilling the religious requirement when it found that his beliefs were "in part at least based upon religious convictions" and where he had only "been influenced by religious training and belief." See also *U.S. v. Stolberg*, 346 F. 2d 363 (7th Cir. 1965).

(B) A Recommendation of the Department of Justice to the Appeal Board Predicated on an Erroneous Legal Theory Vitiates the Entire Proceeding.

The recommendation of the Hearing Officer to the Department of Justice was incorporated into the Department of Justice's recommendation to the Appeal Board. (Ex. 78)

What is the effect of the Department of Justice wrongfully attempting to evaluate a registrant's religious beliefs? Perhaps the most often quoted case on this issue is *Sicurella v. U.S.*, 348 U.S. 385.

In the Sicurella case the registrant claimed a conscientious objector classification but stated that he was able to paricipate in war and use force in the defense of his ministry, kingdom interest and fellow brethren. The Department of Justice considered such religious beliefs as nullifying the registrant's claim and rendered an adverse recommendation. In reversing the Court stated on page 391:

"The report of the Department of Justice on the Appeal Board clearly bases its recommendation on petitioner's willingness to 'fight under some circumstances, namely in defense of his ministry, Kingdom interests, and in defense of his fellow brethren,' and we

> feel that this *error of law* by the Department, to which the Appeal Board might naturally look for guidance on such questions, *must vitiate* the entire proceedings at least where it is not clear that the board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds. There is an impressive body of lower Court cases taking this position and we believe that they state the correct rule." (Cases cited.) Also see *U.S. v. Jakobson*, 325 F. 2d 409 (2nd Cir. 1963) at page 416. (Emphasis ours)

Other cases in accord are: *Hinkle v. U.S.*, 216 F. 2d 8 (9th Cir. 1954); *Hacker v. U.S.*, 215 F. 2d 575 (9th Cir. 1954); *Goetz v. U.S.*, 216 F. 2d 270 (9th Cir. 1954); *Affeldt v. U.S.*, 218 F. 2d 112 (9th Cir. 1954); *Ashauer v. U.S.*, 217 F. 2d 788 (9th Cir. 1954); *Batelaan v. U.S.*, 217 F. 2d 946 (9th Cir. 1954).

In the 9th Cir. case of *Shepherd v. U.S.*, 217 F. 2d 942 (9th Cir. 1954) the Hearing Officer and Department of Justice based their recommendation to the Appeal Board on an erroneous view of the law. The Court stated on page 946:

> "We think that a hearing before a Department, proceeding upon an erroneous theory as to what constitutes opposition to 'participation in war in any form,' is no better than no hearing at all."

In the case of *U.S. v. Everngam*, 102 F. Supp. 128 (S.D. W. Va. 1951) the Court was faced with an analogous situation. There the Hearing Officer refuted the registrant's claim because he was a Catholic and that his beliefs were opposed to the standing of the Roman Catholic Church on the question of warfare.

There the Court provided on page 131 that the "prosecution was bound to prove that such invalid report and

recommendation of the Hearing Officer . . . did not affect the decision of the Appeal Board, or any subsequent decision of the local board."

By virtue of the improper evaluation of appellant's religious beliefs the erroneous recommendation based thereon denied your appellant a fair hearing.

VIII

THE FAILURE OF THE DEPARTMENT OF JUSTICE HEARING OFFICER TO ADVISE THE APPELLANT OF HIS RIGHT TO AN ATTORNEY, AND TO REMAIN SILENT, WAS A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS.

The violation of appellant's Constitutional rights under the Fifth and Sixth Amendments occurred at the outset of the hearing before the Special Hearing Officer for the Department of Justice. There is direct uncontradicted evidence, that the Hearing Officer did not advise appellant of his right to be represented by an attorney, to have an attorney or advisor present during the questioning, to remain silent or that whatever he said could be used against him. (T. 35, 50)

It is suggested that there is a direct analogy between the threatened wrongs in custodial interrogation by law enforcement officers and rights sought to be protected, on the one hand, and the hearing of a naive, religious youth in the office of an attorney acting as a quasi-judicial officer for the Department of Justice, on the other. Your counsel respectfully suggests that with the same rights being jeopardized, the demands for the same precautions are called for as were pronounced in the recent landmark decisions of *Escobedo v. State of Illinois*, 378 U.S. 478 (1964); *Miranda v. State of Arizona*, —— U.S. ——; 16 L ed 2d 694 (1966) and

Johnson v. State of New Jersey, —— U.S. ——; 34 U.S. Law Week 4592 (1966).

(A) The Prospective Aspect of Miranda and Escobedo, Announced in *Johnson v. State of New Jersey*, Does Not Bar Their Application to Appellant's Case.

The Johnson decision by its terms expressly authorizes prospective application of the Escobedo decision to appellant's case (34 LW at 4593). It provided that Escobedo would be applicable to all cases tried subsequent to June 22, 1964. The trial of appellant's cause took place December 6, 1965. (Transcript of Evidence, 12/6/65)

The Johnson case expressly limited application of Miranda to trials after June 13, 1966. Does this restriction then bar application of Miranda's holdings and rationale to appellant's case? The answer is no, it does not. Not at least, insofar as appellant's right to be advised of his right to counsel and of his privilege against self-incrimination are concerned. The reason being, these are the holdings in Escobedo.

In other words, the Miranda case does not create these rights, but merely elaborates on them with Escobedo as their authority. Indeed, the protection of these rights formulated the heart of the Escobedo decision. At the very outset of the Miranda case the Court speaks about procedural safeguards that will protect an individual from incriminating himself. The Court then exclaims, "We dealt with certain phases of this problem recently in Escobedo." (16 L ed 2d at 704)

The decision then goes on to read, still referring to Escobedo, that "The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney." The Court then concludes on page 705:

"We have undertaken a thorough re-examination

of the Escobedo decision and the principles it announced, and we affirm it. That case was but an explication of basic rights that are enshrined in our Constitution — that no person . . . shall be compelled in any criminal case to be a witness against himself, and that the accused shall . . . have the assistance of counsel — rights which were put in jeopardy in that case through official overbearing."

The Court in Miranda, further confirmed its applicability to Escobedo on page 706:

"It was necessary in Escobedo, as here, to insure that what was proclaimed in the Constitution would not become but a "form of words," . . . in the hands of Government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of Escobedo today."

So as to leave no doubt the Court continues on page 718 to emphasize the thrust of the Escobedo decision where it states:

"Our holding there stressed the fact that the police had not advised the defendant of his Constitutional privilege to remain silent at the outset of the interrogation, and we drew attention to that fact at several points in the decision, 378 U.S. at 483, 485, 491. This was no isolated factor, but an essential ingredient in our decision."

The other aspects of the Miranda decision, such as the right of the suspect to be advised of his right to an attorney even though he is indigent, the more stringent rules for waiving Constitutional rights and certain other points, which were not raised in Escobedo, would apparently be barred. These barred points, however, are irrelevent to the successful application of Escobedo to the appellant's case.

Your appellant's case then, comes within the prospective application of Escobedo as its meaning is clarified in the Miranda decision.

(B) Summary of the Procedure Established by Selective Service and the Department of Justice for Hearings on Conscientious Objector Claims.

The administrative rules controlling the determination of conscientious objector claims are unique. The emotion generally involved in such claims – fervent, strong and prejudicial. The burden of proof imposed on a prospective conscientious objector – heavy. The legal penalties for failure – severe. The law regarding judicial review – stringent and limited.

The procedure established by Selective Service and the Department of Justice, regarding the hearings of conscientious objector claims, sets the stage for some of the very wrongs sought to be guarded against in Escobedo.

The point of time appellant's objection occurs – "the crucial period" – is at the hearing by the Special Hearing Officer for the Department of Justice. A brief review of the procedures leading up to and surrounding that hearing will aid in bringing the potential points of jeopardy in true focus.

First, a registrant has a right to a hearing before his local board. He has no right, however, to have anyone appear with him, and is expressly barred from having anyone represent him acting in the capacity of legal counsel. (32 CFR 1624.1) This hearing generally only lasts 10 or 15 minutes. In the majority of cases the local board denies the claim. The registrant is then compelled to appeal.

If an appeal is filed the case is forwarded to the Appeal Board. The Appeal Board will first tentatively determine if the registrant is entitled to his conscientious objector classification. If not, the Appeal Board will then transmit the file to the United States Attorney for the Federal Judicial District in which the Appeal Board has jurisdiction. This is for the purpose of securing an advisory recommendation from the Department of Justice [32 CFR 1625 (a)(b)].

The United States Attorney will cause an investigation of the registrant's background to be conducted by the Federal Bureau of Investigation. (App. E, p. 10)

The Department of Justice will then assign the file to a Hearing Officer for the purpose of holding a hearing on the character and good faith of the registrant. (32 CFR 1626.25 (d)) Hearing Officers are licensed attorneys and are appointed by the Attorney General. (App. E, p. 10)

The Hearing Officer then sets a date for the hearing. He mails a notice of the hearing to the registrant (App. D; App. E, p. 12) along with a resume of the F.B.I. investigation. The Hearing Officer is instructed that the F.B.I. report is not a part of the registrant's Selective service file. (App. E, p. 11) The resume received by the registrant does not set forth the names or addresses of the witnesses. (Ex. 84-100)

These hearings are held right in the attorney's office or in office space furnished by the Department of Justice (App. E, p. 19), generally the former. No court reporter is present. The Hearing Officer only relies upon his memory and any hand-written notes he may make of the hearing. (App. E, p. 19)

A registrant does have a right to have an attorney or advisor present during this hearing. He also has a right to call witnesses, who will appear voluntarily, but these can be excluded from the hearing at the discretion of the Hearing Officer. App. E, p. 13) A brief, but covert reference to these rights is made in the "Instructions to the Registrant." (App. D, p. 9) It should be noted, however, that nowhere is the registrant advised of his right against self-incrimination.

The hearing itself is to be informal, nontechnical and flexible. The ordinary rules of evidence do not apply. The conduct of the hearing is at all times under the direction and control of the Hearing Officer. App. E, p. 12) He is the sole judge in the matter of choice and method to effectuate the

desired result. No one has a right to object to any question or make any argument concerning any phase of the proceeding. (App. E, p. 13)

The registrant has the burden of proof. Each registrant is considered available for military service until he has clearly established his ineligibility [32 CFR 1622 (1)(c)]. The Hearing Officer then prepares and forwards his recommendation to the Department of Justice. Another hard rule generally followed is that the registrant has no right to view the original recommendation of the Hearing Officer. The Department of Justice in turn furnishes its recommendation to the Appeal Board, which includes a resume of the FBI report, a resume of the Hearing Officer's report and his recommendation [32 CFR 1626.25(d)].

It is customary practice, however, that the Department of Justice not only furnishes a "recommendation" but a summary of the facts sustaining their view, and a brief of the case law in their favor. (Ex. 74-82) The resume of the Department of Justice is not binding on the Appeal Board. It is obviously, however, highly persuasive.

The registrant is then furnished with the recommendation of the Department of Justice and given 30 days in which to file a written rebuttal with the Appeal Board [32 CFR 1626.25(e)]. The registrant has no right to appear before the Appeal Board in person or by counsel, to present evidence, ask questions, or to be interviewed. The Appeal Board then decides and classifies the registrant. This procedure is a trial de novo and not a mere review of the local board's classification.

If the Appeal Board's vote is unanimous the decision is final [32 CFR 1626.26(b)]. If the classification is incompatible with the registrant's religious beliefs the result could lead to an indictment.

In the event of indictment, the registrant finds himself

in an adversary proceeding and a unique situation. A situation in which he is prosecuted by the very department that investigated his case and questioned him. It is the very answers he gave in response to the Hearing Officer's questioning that are used as a basis for prosecution.

The general view of the trial courts being, that all the prosecution need do is submit the Selective Service file into evidence, show the registrant refused induction, and they have proved a prima facie case. *U.S. v. Collura*, 139 F. 2d 345 (2nd Cir. 1943).

The Court has been adamant in their ruling that they cannot weigh the evidence. That the Selective Service board's findings are final, although they may be erroneous, so long as they have a "basis in fact." *Estep v. U.S.*, 327 U.S. at 122. A "basis in fact" meaning as little as a mere adverse first impression gained by the Hearing Officer, during a twenty minute questioning period or so, in surroundings absolutely foreign to the registrant. As the Courts have restated many times, the review allowed the Courts in conscientious objector cases is the "narrowest known in law" (*DeRemer v. U.S.*, 340 F. 2d 712, (8th Cir. 1965).

(C) The Inalienable Constitutional Rights Sought to be Protected by Escobedo and Miranda Are Violated in the Administrative Proceedings Concerning Conscientious Objectors.

The prevailing policies and procedures of Government officials in questioning citizens transgressed the Constitutional rights of Escobedo and Miranda. It was the threat that these policies and procedures would relegate the rights in question to "empty words" that motivated the Court to establish the safeguards it did. These very same forces are active and ominously present in the proceedings under which a conscientious objector must seek to establish his claim.

One of the factors jeopardizing a citizen's rights, and sought to be guarded against in Escobedo and Miranda, was the danger inherent in "custodial interrogation."

The Court stated in the Miranda decision on page 706:

> "Our holding . . . briefly stated (is) . . . the prosecution may not use statements . . . stemming from custodial interrogation of the Defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (16 L ed 2d 694)

The Court then continues and describes what it means by "custodial interrogation." It is defined as:

> "Questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise *deprived of his freedom of action in any significant way.*" (Emphasis added)

This definition of "custody" was repeated by the Court in at least two other places. (pp. 725, 726)

The Court then clarifies the much discussed enigma in the Escobedo case, by explaining that "being deprived of freedom of action in any significant way" is what was meant when they spoke of the "investigation which had focused on an accused." See *U.S. v. Fogliana*, 343 F. 2d 43, 46 (9th Cir.)

Was appellant "deprived of his freedom of action in any significant way" when appearing before the Hearing Officer? The answer is emphatically yes! How? Not by the power of a subpoena, but by a much more powerful process. The appellant was under the compulsive threat of forfeiting every right to acquire his conscientious objector claim. Under the threat of bringing down the crushing rule of "failure to exhaust administrative remedies."

What is the result of the "failure to exhaust" rule? If a registrant is prosecuted for refusing induction he could be

absolutely barred, by this generally applied rule, from presenting any evidence proving an otherwise successful defense or right to his claimed classification. [See head quotes cited in Modern Practice Digest, Vol. 3, Key No. 20.9(2)]

Under the fear of such reprisals the registrant's appearance is as compulsive as the act of any suspect being taken into police custody. One submits under the fear of physical violence. The other under the fear of assured incarceration.

Further, let us review the "notice" of the hearing sent to a registrant. (App. D, p. 7) The first thing that meets the registrant's eye is "Department of Justice, Washington, D.C., NOTICE OF HEARING." Then he reads "You are hereby notified that before the undersigned Hearing Officer at . . . , a hearing, at which you are *requested* to be present, will be held by the Department of Justice . . ." (Emphasis added) The last thought he is left with in the "Instruction to Registrants," is "Failure to comply with these instructions may result in the termination of the proceeding."

That a Governmental "request" calls for equal dignity with an "official demand" is verified by weighty authority. In *U.S. v. Minker*, 350 U.S. 179 (1956) an immigration officer issued a subpoena for the defendant to appear and give testimony at the office of the Department of Immigration. The subpoena was in fact of no validity itself. No penalty could be incurred for contempt without a judicial order of enforcement.

Justice Frankfurter could see the practical coercive power this would have upon lay individuals, and in delivering the opinion of the Court he stated on page 187:

> "True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their

> natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation."

This overbearing effect of receiving Government documents by the uninitiated was also recognized in *U.S. v. Scott,* 137 F. Supp. 449, (E. D. Wis., 1956). There the registrant signed a form in which he volunteered for the civilian work program. He just assumed he was "forced to take the job." In holding that this did not constitute a waiver the Court stated on page 455:

> "The defendant might also strongly urge that he signed this application under 'duress.' The final action by the draft board . . . had some coercive tendency either because of ignorance on the part of the defendant of his rights or his natural respect for what appeared to be an official command."

Another threat sought to be protected against in Escobedo and Miranda was the involuntary statement through "official overbearing" (p. 705) in the "Government established atmosphere." (p. 719) (16 L ed 694)

The Court emphasized clearly that compulsive incrimination by brutality was the exception today. That it was the psychological and mental pressures rather than the physical that were the danger. They recognized the truth that "blood was not the only hallmark of unconstitutional inquisition." (pp. 708, 709) It further stated that the presence of an attorney would tend to alleviate this threat.

As we have seen, during the Hearing Officer's hearing, the registrant does have a right to have an attorney present during the hearing, and the right to have witnesses on his behalf. However, all the witnesses may be excluded at the discretion of the Hearing Officer. (App. E, p. 13)

Further, of what value is the right to have an attorney, when in the overwhelming majority of the cases the regis-

trant does not, in fact, know of this right. The right is not to be found in the Selective Service Regulations or in the underlying Congressional Act. The one reference in the Regulations touching upon the point tells the registrant "he has no right to an attorney." [32 CFR 1624.1 (b)]

The brief reference in the "Instructions to the Registrant" squelched among all the "whereases" and "aforesaids" does not even colorably comply with the Government's duty in this regard. (App. D, p. 9) Further, these instructions are sent out at least 10 days before the hearing (App. E, p. 12), and the brief reference is more deeply obscured in a maze of papers including the notice of hearing, the resume of the F.B.I. investigation, and the instructions themselves.

No reference whatsoever is made to the registrant's right against self-incrimination, or that whatever he says could be used against him in any subsequent prosecution.

Then, even if the registrant does not have an attorney present, the Hearing Officer is in complete charge of the hearing. He can ask whatever questions he pleases. Neither the attorney nor the registrant has the right to make any objection whatsoever. (App. E, p. 13) Any attempt to do so could terminate the entire proceedings. (App. D, p. 9)

The hearing is truly dominated by the Hearing Officer in every respect. More so than the interrogation by police officers. As Miranda so vividly points out, the police must resort to trickery and skulduggery in achieving answers. Not so with the Special Hearing Officer. He need only ask whatever question suits him. His "suspect" must come forth with the answer without hesitancy or balking. Any such response, or refusal to answer the most intimate question, could result in incurring the Hearing Officer's displeasure. The result — a weighty, if not conclusive finding of insincerity.

The most current, and strongest case, known to counsel concerning a registrant's right to an attorney during the

Selective Service process is found in *U.S. v. Wierzchuchi*, 248 F. Supp. 788 (W. D. Wis., 1965).

Appellant, and other registrants, are thrust into an analogous atmosphere of official overbearing when they are compelled to attend the hearing for the Special Hearing Officer. It is true that the atmosphere is not the dank darkness of a police interrogating room arranged to break down the hardened criminal. But we must remember, that in a conscientious-objector hearing we are not dealing with a hardened criminal. Rather a reserved, naive, youthful religious individual.

An individual that is impressed and awe-struck at the dignity of officialdom. An individual whose will, by the very essence of the claim he is professing, is in subjection to higher authorities. An individual who is apprehensive and defensive, who respects and many times fears the austere, dignified atmosphere of an attorney's office. An individual who attends the hearing fraught with a lifetime of teaching, right and wrong, about the grilling capabilities of attorneys. All the pressures of which subjugate his will to the keenness of the attorney who is assigned to probe, unrestrictively, the registrant's innermost subjective thoughts.

Experience in attending these proceedings has shown your counsel the effect such surroundings have on a conscientious objector. More than once the registrant will make a remark or give an answer which is unintentionally incorrect and harmful to him. When asked why he said it, the inevitable answer is, "I don't know. I was just confused by the question and what he was getting at."

At first impression does the analogy between the typical interrogating room and the Hearing Officer's office appear to be an extended analogy? The Honorable Justice Black did not believe so. In *U.S. v. Minker, supra*, he himself drew a like analogy. Please see Appendix H for the imperative quote.

The Court in Miranda made clear that the privilege against self-incrimination is not limited to criminal Court proceedings. It commented emphatically:

> "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal Court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves." (p. 719)

The Court went on to say that it was necessary in Escobedo to insure that what was proclaimed in the Constitution did not become a "form of words in the hands of *Government officials*" – not just police officers.

As was cited from the Wan case "compulsion renders involuntary either in judicial proceedings *or otherwise*." (p. 717)

Counsel wants to make clear, that if the right against self-incrimination is not protected at this point for a conscientious objector, it is lost forever. It is at this point that the damage, if any, is done. It is at this point the rights are violated. It is at this point the right has meaning.

If anyplace, it would be at the trial that the registrant is desirous of testifying. And it is there where judicial cases would silence him. If the right is not granted him at the Hearing Officer's hearing, then it is merely an empty shell thereafter.

The only protection that can be afforded the registrant is his constitutional right to remain silent. To remain silent without an adverse inference being drawn. And of what value is this right to a youth of draft age, unless he is advised of it in the first instance by the Hearing Officer. And even then, unless perhaps by his own attorney at the appropriate times during the hearing. Any testimony elicited in viola-

tion of the safeguards announced in Escobeda and Miranda should be held to taint the findings of the Appeal Board.

If these rights cannot be exercised before the Hearing Officer, then the registrant will be compelled to weave the noose that will merely be placed around his neck at the trial of his cause. The trial will then only become one more step in the formality preceding execution of the potential penalties.

The compelling need of adequate warning regarding the privilege against self-incrimination and the right to counsel, emphasized in Escobedo, is likewise applicable here:

> "Escobedo explicated another facet of the pre-trial privilege . . . without the protections flowing from adequate warnings and the rights of counsel, 'all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." (Cases cited) 16 L ed 2d at 719.

The fact that the particular application of the rights in question have not been customarily exercised in this respect before, is immaterial. As stated on page 706 of Miranda the Court referred to the flexible principles of our Constitution and stated:

> ". . . our contemplation cannot be only what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction."

IX

THE COURT ERRED IN SUSTAINING THE GOVERNMENT'S OBJECTION TO THE INTRODUCTION OF TESTIMONY FROM CERTAIN OF APPELLANT'S WITNESSES.

Please see Specification of Errors Point III for summary.

The objection to Gerald Lindberg's testimony was improperly sustained, as "heresay" was not a proper ground. (46, 47) As the witness would have testified to the fact of the conversation and not the truth thereof.

Second grounds of it not being in the record was improper as the testimony was only to supplement the record and not submit new evidence in direct support of appellant's claim. (T. 49-51)

The sustaining of the objection to the testimony of Donald Roulette was improper for the same grounds as above-mentioned.

The objection to the testimony of Valdon White was improperly sustained in that the proferred testimony was obviously relevant.

As the sustaining of the objection constituted plain error to the prejudice of appellant he is entitled to a new trial.

Conclusion

Due to the admitted sincerity of the appellant in conjunction with the patent violations of due process, justice truly requires that the judgment of the District Court be reversed.

Respectfully submitted,

Ralph K. Helge
285 W. Green St., Suite 205
Pasadena, California 91105
Area Code 213, SY 5-5525
Attorney for Appellant

Certification

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Ralph K. Helge, *Attorney*

APPENDIX A

Index of Exhibits in Record

(Reporter's Transcript of Evidence of Dec. 6, 1965)

(Reporter's Transcript of Evidence January 21, 1966)

APPENDIX B

(Defendant's Exhibit A-1)

REPORT OF HEARING CONDUCTED BY THE DEPARTMENT OF JUSTICE PURSUANT TO SECTION 6(j) OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT.

In re: KENNETH GERALD STOREY, JR.
S. S. No. 45 6 40 53 — Conscientious Objector

DATE OF GIVING NOTICE OF HEARING:

One copy each of Resume and Instructions to Registrants were sent to the registrant with Notice of Hearing on November 21, 1963.

HEARING HELD PURSUANT TO NOTICE:

At 1018 Northern Life Tower, Seattle, Washington, on December 4, 1963, at 4:00 P.M. The registrant appeared personally and in company with one Gerald A. Lindberg, of 31452 13th S. W., Federal Way, Washington.

NATURE OF CLAIM FOR EXEMPTION:

Claim is for exemption from both combatant and noncombatant service in the armed forces based upon registrant's training and religious belief and conviction.

STATEMENT OF FACTS:

Gerald A. Lindberg, who accompanied the registrant, identified himself as being an active member of the Radio Church of God, which was the church in which registrant was actively affiliated, and was familiar with the teachings of this church and with registrant's activities in it. Lindberg stated the Radio Church of God held to the belief that their members should not serve in the armed forces in either a

combatant or noncombatant capacity; that they can, however, serve or be assigned to work of a public nature unconnected with military activity. Lindberg stated that he believed the registrant fully subscribed to the teachings of this church.

The registrant, Kenneth Gerald Storey, Jr., stated that he was born in Spokane, Washington, January 5, 1940, and presently resided at 4410 South 176th in Seattle, Washington. The registrant stated, "I am not a citizen of this country — I am a citizen of the Kingdom of Heaven — I am an ambassador of God." He stated further that the Ten Commandments prohibit killing and therefore he could not possibly affiliate with the armed forces in any manner.

The registrant stated that there was nothing in his religious training and belief, however, that would prevent his going into a work program of a public nature provided it was not connected with the military, observing, however, that he could not work in a noncombatant military facility without doing violence to his religious belief. The registrant stated that he was employed by the Boeing Airplane Company in Seattle, working at the Transport Division of that company in Renton, Washington. He stated that, while he had been working on the missile program in the area of electronic communication, that he never at any time considered himself a builder or worker on the missiles. His present assignment at the Boeing Airplane Company is not connected with the missile program, and the registrant appeared to be embarrassed and uncertain in his justification of his previous assignment in the missile area of the Boeing Company.

The registrant stated that he was an active member in the Radio Church of God; that he had intended to register in Ambassador College, maintained by that church in Pasadena, but that because of overcrowded conditions they could not presently accept him as a student; that he did in-

tend to enroll, however, in another Radio Church of God college during the winter quarter of 1964.

The registrant stated that he intended to devote himself fully to church activity and work in the Radio Church of God and to ultimately enter the ministry when he had completed his schooling. The registrant observed that the teachings of his church would prohibit his work in a hospital which might bring him into contact with blood transfusions or work in any assignment that might require employment on Saturdays, the same being regarded by him as a holy day. The registrant appeared to be sincere in his representations as to his religious training and belief.

CONCLUSION:

It is concluded that the registrant is in fact a conscientious objector to combatant military service based upon his religious training and belief. It is further concluded, however, that, within the limitations of registrant's religious training and belief, such as not working in the area of blood transfusions in hospitals or on Saturdays, there is nothing in registrant's situation that would prohibit his service in a noncombatant capacity or in an area of assigned public work.

RECOMMENDATION:

Based upon the conclusions reached as a result of this hearing, it is recommended that the registrant's appeal be allowed in part and that he be classified as a conscientious objector to combatant military service, but that he not be exempted from noncombatant military service or service of an assigned public nature commensurate with the conclusions hereinabove stated.

JOHN D. MCLAUCHLAN
Special Hearing Officer

APPENDIX C

OFFICE OF ATTORNEY GENERAL

WASHINGTON, D.C.

MARCH 12, 1963

Memorandum to Chief, Conscientious Objector Section, Department of Justice.

Re Effect on claims for exemption from noncombatant service of willingness to perform defense work.

In two cases now pending before the Supreme Court of the United States (*Harshman v. United States*, No. 515, and *Parker v. United States*, No. 516), the recommendations of the Department to the Selective Service Appeal Board appear to be susceptible of an interpretation which would reflect an erroneous view of the law applicable to the above subject. The recommendations can be interpreted as implying that even if a registrant is sincerely and conscientiously opposed to noncombatant service, he cannot, as a matter of law, qualify for an exemption from such service if he is engaged or states that his beliefs would permit him to engage as a civilian in production of materials for the armed forces. I have been advised by the Assistant Attorney General in charge of the Office of Legal Counsel that this view of the law is not taken by your section or by his Office. However, in view of the fact that this question has been raised I wish to insure that all necessary action is taken to eliminate any possibility of misunderstanding that may have arisen on the part of the Department's personnel as to the proper legal standards in this regard.

In every case of a claim for exemption from noncombatant service, the ultimate issue is whether the registrant is "conscientiously opposed to participation in ° ° ° noncombatant service" within the meaning of 50 U.S.C. App.

§ 456 (j). This issue does not, of course, arise unless the registrant has established his eligibility for the lesser exemption from combatant training and service by demonstrating that he is "conscientiously opposed to participation in war in any form." In determining the genuineness and sufficiency under the statutory standards of a registrant's claimed beliefs, it is proper for consideration to be given to his attitudes and beliefs regarding participation in defense work as a civilian. Indeed, a registrant's willingness to earn his living by producing materials for the armed forces may of itself provide an adequate basis for concluding that the registrant is not "conscientiously opposed to participation in * * * noncombatant service." However, such evidence does not always or necessarily have that effect. Cases may be readily imagined in which the registrant's beliefs would permit some degree of participation by him in some kinds of defense-related civilian activity, yet still would qualify him for the exemption. The issue is generally whether the registrant is sincere in his claimed beliefs, and logical inconsistency on his part, while always relevant as a factor to be considered, is not necessarily decisive.

Please be good enough to inform the Selective Service System of the contents of this memorandum and request that agency to inform its appeal boards. Also, please take all action necessary to insure that Department personnel who are engaged in the processing of appeals in this type of case, including hearing officers are appropriately informed.

ROBERT F. KENNEDY,
Attorney General.

APPENDIX D

Form No. C-27
(Rev. 4-2-56)

DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

NOTICE OF HEARING

Seattle	Washington	November 21, 1963
(City)	(State)	(Date)

TO: KENNETH GERALD STOREY, JR.
(Name of Registrant)

4410 South 176th	Seattle 98188	Washington
(Street Address)	(City)	(State)

You are hereby notified that before the undersigned Hearing Officer at

1018	Northern Life Tower	3rd Ave. & University St.
(Room)	(Building)	(Street Address)

Seattle	Washington	, at 4:00 P.M.
(City)	(State)	(Hour)

o'clock on December 4, 1963, a hearing, at which you are
(Month) (Day)
requested to be present, will be held by the Department of Justice to consider your claim to exemption from training and service under the Universal Military Training and Service Act by reason of your alleged conscientious objection to participation in war in any form. Only your conscientious-objector claim will be considered by the Department of Justice.

JOHN D. MCLAUCHLAN
Special Hearing Officer for the Department of Justice

ADDENDUM NO. I TO INSTRUCTIONS TO SPECIAL HEARING OFFICERS FOR THE DEPARTMENT OF JUSTICE IN CONSCIENTIOUS-OBJECTOR MATTERS

NOTICE OF HEARING AND INSTRUCTIONS TO REGISTRANTS WHOSE CLAIMS FOR EXEMPTION AS CONSCIENTIOUS OBJECTORS HAVE BEEN APPEALED

---

1. Pursuant to the provisions of section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. 456(j)), hereinafter referred to as the Act, and section 1626.25 of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of the registrant's objections to training and service under the Act on the ground that the registrant is conscientiously opposed to participation in war in any form. The scope of the hearing is restricted to consideration of the merits of the conscientious-objector claim only. Consideration of ministerial claims and all other claims is within the exclusive jurisdiction of the Selective Service System .

2. The hearing will be conducted by the undersigned, a Special Hearing Officer for the Department of Justice, appointed by the Attorney General of the United States.

3. It is incumbent upon the registrant to establish that he is entitled to the conscientious-objector classification he claims. The registrant has a right to appear at the hearing and make a full and complete presentation of his claim. The registrant may testify orally and may present witnesses in support of his claim. However, no Government funds are available for the payment of witness fees or travel expenses.

4. The registrant may also submit at the hearing written statements or documents, or certified copies thereof, in

support of his conscientious-objector claim. Written statements shall be sworn to or affirmed before a notary public or other persons authorized to administer oaths. Such statements or documents will be considered for whatever bearing they may have upon the registrant's conscientious-objector claim. They will not be considered in connection with any other claim whatsoever.

5. Attached hereto is a resume of the information developed by the inquiry conducted pursuant to the aforementioned Act. If the registrant wishes to deny, explain, or otherwise comment upon any information contained in the resume, he should do so in a written statement to the Hearing Officer. At the hearing the registrant will be entitled to discuss the information contained in the resume and to present witnesses to refute or corroborate such information.

6. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. Technical rules of evidence will not apply at the hearing, but reasonable bounds will be maintained as to relevancy and materiality. In addition to his witnesses, the registrant may have an attorney, relative, friend, or other adviser present at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions, or to make any arguments concerning the proceeding. In order that the conduct of the hearing may comport with the necessary requirements of dignity, orderliness, and expedition, the Hearing Officer will be the sole judge in the matter of choice of a method of procedure designed to effectuate the desired result.

7. Failure to comply with these instructions may result in the termination of the proceeding.

JOHN D. MCLAUCHLAN
Special Hearing Officer for the Department of Justice

APPENDIX E

INSTRUCTIONS TO SPECIAL HEARING OFFICERS FOR THE DEPARTMENT OF JUSTICE IN CONSCIENTIOUS-OBJECTOR MATTERS

MEMO NO. 41 (Revised)

April 2, 1956

PART 100—AUTHORITY AND RESPONSIBILITY

Sec. 100.1 Section 6(j) of the Universal Military Training and Service Act, as amended (50 U.S.C. App. 456(j)), hereinafter referred to as the Act, requires the Department of Justice to make inquiry, hold a hearing with respect to the character and good faith of the conscientious-objector claim of any Selective Service registrant whose classification by his local board is appealed, and to make a recommendation to the appropriate Selective Service Appeal Board.

Sec. 100.2 The required hearing shall be conducted by a Special Hearing Officer for the Department of Justice, appointed by the Attorney General for such purpose. The Hearing Officer shall render a report of such hearing to the Department of Justice which shall consider such report in making its recommendation to the appropriate Appeal Board.

* * * *

Sec. 100.4 The appropriate United States Attorney shall arrange for the required investigation and shall transmit to the Hearing Officer the Selective Service Cover Sheet, the investigative report for use in conducting the hearing, and two copies of a resume of such report.

PART 101—HANDLING DOCUMENTS

° ° ° °

Sec. 101.2 The Federal Bureau of Investigation reports which are made in these cases are confidential and are for the Hearing Officer's information and assistance in arriving at a conclusion regarding the character and good faith of the registrant's alleged conscientious objection. The Federal Bureau of Investigation report is not a part of the Selective Service System file of the registrant, and he should not be allowed to see it under any circumstances.

Sec. 101.3 Although the registrant is not allowed access to the Federal Bureau of Investigation reports a fair resume of the information contained therein shall be furnished the registrant. The resume will be forwarded to the Hearing Officer in duplicate by the United States Attorney with the file in the case. The Hearing Officer shall attach a copy of the resume to the Notice of Hearing which he sends the registrant. The second copy is for the use of the Hearing Officer and should be returned to the Department with his report of hearing.

PART 102—PREPARATION FOR HEARING

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Sec. 102.2 If the Hearing Officer deems it advisable, he may request the United States Attorney to arrange for such further investigation of matters pertinent to any case as appears necessary to a complete hearing on the claim, or he may confer personally with the local office of the Federal Bureau of Investigation concerning the case.

PART 103—NOTICE AND INSTRUCTIONS TO REGISTRANTS

Sec. 103.1 The Hearing Officer shall notify the registrant concerned of the time and place of the hearing at least ten days prior to the date set for the hearing. The Notice of Hearing must be accompanied by a copy of Instructions to Registrants, and one copy of the Resume of the Inquiry received from the United States Attorney. The Notice of Hearing and the Instructions to Registrants should be signed by the Hearing Officer. Notice of Hearing forms and Instructions to Registrants will be furnished the Hearing Officer by the Conscientious Objector Section, Department of Justice, Washington 25, D. C.

* * * *

PART 104—CONDUCT OF THE HEARING

Sec. 104.1 The hearing contemplated under the Act is to be in the nature of an administrative proceeding and shall be informal, non-technical, and flexible. Care shall be exercised to avoid any resemblance to a judicial proceeding or a prosecutive action, and in no sense shall the registrant be deemed to be on trial. The ordinary rules of evidence shall not apply. The Hearing Officer is not authorized to subpena witnesses or to administer oaths, and consequently the testimony of voluntary witnesses will not be sworn. The hearing shall be conducted in an orderly, dignified, and expeditious manner. Conduct of the hearing shall at all times be under the direction and control of the Hearing Officer, and the

Hearing Officer is to be the sole judge in the matter of choice of method to effectuate the desired results.

Sec. 104.2 The scope of the hearing shall be restricted to consideration of the merits of the conscientious-objector claim only, and it shall be the function of the Hearing Officer to secure the facts upon which to base his findings and his recommendation to the Department of Justice.

Sec. 104.3 The Hearing Officer shall allow the informal presentation of the testimony of the registrant and his witnesses. All relevant testimony shall be received. The Hearing Officer shall be the sole judge of the relevancy of the testimony.

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Sec. 104.5 The Hearing Officer shall permit the registrant to have one attorney or other personal adviser, who may sit with the registrant during the hearing. Neither the registrant's adviser nor any other person shall be permitted to object to any question or make any argument concerning any phase of the proceeding.

Sec. 104.6 Within the discretion of the Hearing Officer, the registrant's witnesses may remain in the hearing room, or they may be excluded and called one at a time. One personal adviser, however, may remain with the registrant in the hearing room during the entire proceeding.

° ° ° °

PART 105—REQUIREMENTS AND OBJECTIVES OF THE HEARING

Sec. 105.1 The basic objective of the hearing in all conscientious-objector cases is to ascertain the character and good faith of the objections of persons who claim exemption as conscientious objectors. It is necessary, therefore, to determine the sincerity of the registrant in making the conscientious-objector claim, and to examine the nature or character of the claim in light of the requirements of the Act.

Sec. 105.2 The exemption provided for conscientious objectors, in section 6(j) of the Act, does not have its basis in a constitutional guarantee but is a special benefit granted by the Congress. It is a well-known rule of statutory construction that grants by the legislature which confer special benefits or exemptions in derogation of common and equal rights are to be construed strictly against the grantee. Thus, this section which grants exemption to a particular class from the general burdens of the State is subject to strict and literal construction.

Sec. 105.3 The Supreme Court of the United States has held in a number of cases that determinations made by discretionary administrative bodies are final, although they may be erroneous, if they are not arbitrary or capricious, or unless there is no basis in fact for the determination. Probably for this reason the courts have never indicated the standard of proof applicable to hearings in conscientious-objector cases.

* * * *

Sec. 105.5 The Act provides exemption for persons who are, by reason of religious training and belief, conscien-

tiously opposed to participation in war in any form. The term "religious training and belief" is defined in the Act as the individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation. The Act specifically excepts from its definition of religious training and belief essentially political, sociological, or philosophical views or a merely personal moral code. It is incumbent upon the registrant, therefore, to show that his objections stem from his religious training and belief as defined in the Act.

° ° ° °

Sec. 105.8 A person who is exempt from combatant training and service will, if inducted, be assigned to noncombatant training and service as defined by the President in Executive Order No. 10028 of January 13, 1949, as follows:

> The term 'noncombatant service' shall mean (a) service in any unit of the armed forces which is unarmed at all times; (b) service in the medical department of any of the armed forces, wherever performed; or (c) any other assignment the primary function of which does not require the use of arms in combat; provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.
>
> The term 'noncombatant training' shall mean any training which is not concerned with the study, use, or handling of arms or weapons.

Section. 105.9 Under the Act and the Selective Service Regulations, a person who is exempt from both combatant and noncombatant training and service shall, in lieu of in-

duction, be ordered by his local board to perform for a period of 24 months civilian work contributing to the maintenance of the national health, safety, or interest.

PART 106—THE REPORT AND RECOMMENDATION

Section. 106.1 Based upon the conclusions reached as a result of the hearing, the Hearing Officer may make one of three possible recommendations to the Department of Justice. These are as follows:

(1) "The Hearing Officer recommends that the appeal of the registrant, based upon grounds of conscientious objection, be not sustained." This recommendation shall be made when the registrant claims exemption from combatant training and service only or from both combatant and noncombatant training and service and any one of the following conclusions is reached:

(a) The registrant is not opposed to participation in war in any form.

(b) The registrant's conscientious objections are not based on religious training and belief.

(c) The registrant's claim is not made in good faith.

(2) "The Hearing Officer recommends that the appeal of the registrant, based upon grounds of conscientious objection, be sustained." This recommendation shall be made when the registrant claims exemption from combatant training and service only

or from both combatant and noncombatant training and service and all of the following conclusions are reached:

(a) The registrant is opposed to participation in war in any form.

(b) The registrant's conscientious objections are based upon his religious training and belief.

(c) The registrant is sincere and his claim is made in good faith.

(3) "The Hearing Officer recommends that the registrant be exempt from combatant training and service only and if inducted into the armed forces he be assigned to noncombatant training and service as defined by the President." This recommendation shall be made when the registrant claims exemption from both combatant and noncombatant training and service and the following conclusions are reached:

(a) The registrant is conscientiously opposed to combatant training and service.

(b) The registrant's conscientious objections are based upon his religious training and belief.

(c) The registrant is not conscientiously opposed to noncombatant training and service.

° ° ° °

PART 107—REVIEW BY THE DEPARTMENT OF JUSTICE

Sec. 107.1 When the registrant's file and the report of the Hearing Officer are received by the Department of Justice, they are inspected to assure that the Department has jurisdiction in the case, and that the registrant has been afforded all his rights under the Act and the Regulations promulgated thereunder. If the case is in proper order, the Department proceeds to review the case and make its recommendation to the appropriate appeal board as required by the Act. In some instances, it may be necessary to return the registrant's file to the Selective Service System for further action, and in exceptional circumstances it may be found advisable to return a file to the Hearing Officer for additional information or a more complete report.

PART 111—SUBPOENA

Sec. 111.1 In cases arising under section 12, Universal Military Training and Service Act, courts generally deny motions to subpoena Hearing Officers.

Sec. 111.2 The Hearing Officer occupies a quasi-judicial position, and the mental process by which he arrives at a conclusion or recommendation is not a proper subject of inquiry by the court.

Sec. 111.3 The Hearing Officer may not testify as to the content of the Federal Bureau of Investigation report. He should notify the United States Attorney immediately, should a subpoena relating to any conscientious-objector case be served upon him.

PART 112—STENOGRAPHIC ASSISTANCE

Sec. 112.1 Should the Hearing Officer require stenographic assistance in preparing his reports, he should request it of the United States Attorney, giving him an estimate of the requirements.

Sec. 112.2 Since the testimony in conscientious-objector cases is not legalistic, and usually is not lengthy or involved, most Hearing Officers are able to prepare their reports from personal notes taken at the hearing. In unusual cases the Hearing Officer may wish to have a transcript of the hearing. Request for reportorial service should also be made to the United States Attorney as indicated above.

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PART 114—OFFICE SPACE

Sec. 114.1 Suitable space for holding hearings is usually available in Federal Buildings. The United States Attorney will assist the Hearing Officer in arranging for a mutually agreeable location.

Sec. 114.2 If the Hearing Officer finds it more convenient to hold hearings in his office, he may do so with the approval of the United States Attorney, provided that no expense accrues to the Government for use of space in such office.

Attorney General

APPENDIX F

The formidable doctrinal requirements of appellant's Church adhered by him are: keeping the weekly Saturday Sabbath from Friday sundown to Saturday sundown by not working, and spending the time in Bible study; by likewise refraining from everyday activity on seven other annual Holy days; by refraining from eating any products made with leaven for a period of seven specific days out of the year; by refraining from all food and water for a full twenty-four hours at least once a year, by donating ten percent of his gross income to the Church and setting aside a second ten percent of his gross income for expenses to attend the annual Holy days; by not eating pork products or other foods the Bible condemns as unclean; by attending the Church's public speaking club one night a week and Bible study another night; by donating work to the publication of the Church newspaper; by not smoking and by refusing to take defense related employment. (Ex. 132; Govt's. Ex. 2; T. 36)

APPENDIX G

The numerous and varied religious grounds upon which appellant predicated his objections to noncombatant service are, in summary form:

> That he was now a servant of God, could not serve both God and man and therefore could not become a slave to man (I Cor. 7:23). That by going into the military he would be a slave to man, this would be sin, and would subject him to eternal damnation. That if he

helped anyone who did not follow God's Word, he would be partaking of their evil deeds (II John 10-11) and God commanded him not to be partaker of another man's sins (I Tim. 5:22). That we are to love our neighbors and even our enemies (Matt. 5:43). That the military stands forever opposite to God's Word. That it is better to be defrauded than to fight back (I Cor. 6:1-7). That vengeance is God's and not his. That a Christian is to turn the other cheek. (Ex. 59)

That Jesus said His servants would not fight in this world (John 18:36). That a Christian is forbidden to become a party of the world or to engage in its conflicts or its goals (James 4:4; I John 2:15). That Christ taught We should not fight or resist evil, not take vengeance upon others ourselves, but that we should render good for evil. (Ex. 133-134)

That he did not believe in a malicious force but only a restraining force such as holding someone so that they could not afflict wounds or injury to someone else. (Ex. 132)

That he could not in any manner, directly or indirectly, take human life and that bearing arms and coming under the military authority would be contrary to fundamental doctrine of his belief. (Ex. 145-146)

APPENDIX H

In *U.S. v. Minker,* 350 U.S. 189 an immigration officer attempted to compel the attendance of a citizen into the immigration officer's private chambers by a nonjudicial subpoena. On page 191 the Court stated:

"The object in summoning Minker was to interrogate him in the immigration officer's private chambers to try to elicit information 'relating to the possible institution of proceedings seeking the revocation of * * * (Minker's) naturalization.* * *' Information so obtained might be used under some circumstances in court to take away Minker's American citizenship or convict him of perjury or some other crime. Thus the capacity in which this immigration officer was acting was precisely the same as that of a policeman, constable, sheriff, or Federal Bureau of Investigation agent who interrogates a person, perhaps himself a suspect, in connection with murder or some other crime. Apparently Congress has never even attempted to vest FBI agents with such private inquisitorial power. Indeed, this Court has construed congressional enactments as designed to safeguard persons against compulsory questioning by law enforcement officers behind closed doors. And we have frequently set aside state criminal convictions as a denial of due process of law because of coercive questioning of suspects by public prosecutors and other law enforcement officers in their official chambers. Yet power of the Attorney General and immigration officers to compel persons, including suspects, to appear and subject themselves to questioning by law enforcement officers in their private chambers is precisely what the Department of Justice claims here."